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No. 8237

No. 13932

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

EBEN H. CARRUTHERS and NANCY CARRUTHERS,
Appellees.

Transcript of Record

Appeal from the United States District Court for the District of Oregon

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, California

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

GORDON SLOAN,
Spexarth Building,
Astoria, Oregon;

CARL E. DAVIDSON and
CHARLES P. DUFFY,
1525 Yeon Building,
Portland, Oregon,

For Appellants.

HENRY L. HESS,
United States Attorney;

VICTOR E. HARR,
Assistant United States Attorney,

United States Courthouse,
Portland, Oregon,

For Appellee.

In the United States District Court for the District of Oregon

Civil No. 6486

EBEN H. CARRUTHERS and NANCY CARRUTHERS, Plaintiffs,

vs.

UNITED STATES OF AMERICA, Defendant.

COMPLAINT

1. This is an action for the recovery of individual income taxes erroneously and illegally collected from plaintiffs by the Collector of Internal Revenue of the United States, for the District of Oregon, for the calendar year 1950. Jurisdiction of this action is based upon Section 1346 (a)(1) of Title 28, United States Code.

2. Plaintiffs are, and at all times mentioned herein were, residents and inhabitants of Clatsop County, Oregon, Hugh H. Earle is, and since September 1, 1947 has been, the Collector of Internal Revenue for the District of Oregon.

3. Plaintiffs are, and at all times mentioned herein were, husband and wife.

4. Heretofore, and by virtue of certain agreements, plaintiff Eben H. Carruthers granted to the E. H. Carruthers Company, an Oregon corporation, the exclusive license to manufacture, use, sell or lease certain inventions relating to the processing and packing of tuna fish. Such license extends for the life of the patents and for such additional time

thereafter as there would be measurable return from the use of such patents by such company. Amounts designated as "royalties" were provided as payment to plaintiff Eben H. Carruthers for the exclusive license to use, manufacture, sell or lease said inventions and patents. The amount so received by plaintiff Eben H. Carruthers in the year 1950 represented profit to him on the sale of said patents and was, therefore, taxable at capital gain rates in accordance with the provisions of Section 117 of the Internal Revenue Code of the United States.

5. The income of plaintiff Eben H. Carruthers for the year 1950 was reported by him in a joint income tax return filed with plaintiff Nancy Carruthers. In filing their income tax return for the year 1950 plaintiffs erroneously reported as ordinary income the amounts so received by plaintiff Eben H. Carruthers in the year 1950 from E. H. Carruthers Company, an Oregon corporation. Plaintiffs paid the income tax due on their said return to the Collector of Internal Revenue of the United States for the District of Oregon, in the total amount of $10,581.98. Thereafter, and on or about October 1, 1951, plaintiffs duly filed with the Collector of Internal Revenue of the United States for the District of Oregon, for transmission to the Commissioner of Internal Revenue of the United States, their claim for refund of $3,635.92, upon the ground that the amount so received by plaintiff Eben H. Carruthers in the year 1950 represented profit to him on the sale of said patents, rather than ordinary income to him.

6. Plaintiffs have not received the statutory notice of the disallowance of said refund claim, as provided in Section 3772 (a)(2) of the Internal Revenue Code of the United States, but more than six months have expired since the filing of said refund claim.

7. The amounts received by plaintiff Eben H. Carruthers during the year 1950 from E. H. Carruthers Company, an Oregon corporation, by virtue of said agreements, constituted long-term capital gains subject to the limitations of Section 117 of the Internal Revenue Code of the United States, Title 26.

Wherefore, plaintiffs pray for judgment against defendant in the amount of $3,635.92, with interest thereon as provided by law, and for their costs and disbursements incurred herein.

/s/ GORDON SLOAN,
/s/ CARL E. DAVIDSON,
/s/ CHARLES P. DUFFY,
Attorneys for Plaintiffs

[Endorsed]: Filed June 2, 1952.

[Title of District Court and Cause.]

ANSWER

The defendant, by and through, Henry L. Hess, United States Attorney in and for the District of Oregon for answer to the complaint herein filed, alleges:

I.

Defendant denies the allegations contained in paragraph 1, except that it admits that this action is for the recovery of income taxes paid to the Collector of Internal Revenue for the calendar year 1950 and that the action purports to be brought under the provisions of Section 1346 (a)(1) of Title 28, United States Code.

II.

Defendant admits the allegations contained in paragraph 2.

III.

Defendant admits the allegations contained in paragraph 3.

IV.

Defendant denies the allegations contained in the last sentence of paragraph 4. Defendant is without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in paragraph 4.

V.

Defendant admits the allegations contained in paragraph 5, except that it denies the allegations contained in second sentence of said paragraph and denies any allegations contained in said claim for refund not herein specifically admitted.

VI.

Defendant admits the allegations contained in paragraph 6.

VII.

Defendant denies the allegations contained in paragraph 7.

Wherefore, having fully answered, defendant prays that the complaint be dismissed at plaintiff's costs.

/s/ HENRY L. HESS,
United States Attorney
/s/ VICTOR E. HARR,
Asst. U. S. Attorney
/s/ DONALD W. McEWEN,
Asst. U. S. Attorney

Affidavit of Service by Mail attached.

[Endorsed]: Filed Aug. 28, 1952.

[Title of District Court and Cause.]

PRETRIAL ORDER

This cause having come on regularly for a pretrial conference before the Honorable Claude McColloch, one of the judges of the above-entitled court, at Portland, Oregon, on the 21st day of November, 1952, plaintiffs appearing by Gordon Sloan and Charles P. Duffy, their attorneys, and defendant appearing by Fred S. Gilbert, Special Assistant to the Attorney General of the United States, and Thomas R. Winter, Civil Advisory Counsel of the Bureau of Internal Revenue of the United States, and the following proceedings were had and done:

Admitted Facts

It appears from the pleadings and the pretrial proceedings that the following facts are admitted and may be taken and deemed by the Court on the trial of this action as established facts therein:

I.

This is an action for the recovery of individual income taxes collected from plaintiffs by a former Collector of Internal Revenue of the United States for the District of Oregon for the calendar year 1950. Jurisdiction of this action is based upon Section 1346 (a)(1) of Title 28, United States Code.

II.

Plaintiffs are, and at all times material herein, were residents and inhabitants of Clatsop County, Oregon. During the period from September 1, 1947, to November 1, 1952, Hugh H. Earle was the Collector of Internal Revenue for the District of Oregon.

III.

Plaintiffs are, and at all times material herein were, husband and wife.

IV.

On or about the 27th day of May, 1950, plaintiff Eben H. Carruthers entered into a "contract" with the E. H. Carruthers Company, an Oregon corporation, (a copy of which has been marked herein as Plaintiffs' Exhibit 4), and on or about the 31st day of May, 1950, plaintiff, Eben H. Carruthers, entered into a "License Agreement" with the same corpora-

tion (a copy of which is marked herein as Plaintiffs' Exhibit 5), under the terms of which plaintiff Eben H. Carruthers, among other things, granted to said corporation "an exclusive license to manufacture, use, sell or lease machinery or to practice any method in accordance with or as set forth in certain United States and foreign patents and applications for patents, together with the right to sublicense others", as more fully stated in said agreement.

V.

At the time of incorporation of the E. H. Carruthers Company, an Oregon corporation, on June 1, 1945, the stockholders of said corporation were as follows:

Stockholder	No. of Shares
Eben H. Carruthers	80
Richard Schroeder	10
Winslow E. Thompson	10

At the time the agreements described in the foregoing paragraph were entered into the stock of E. H. Carruthers Company, an Oregon corporation, was owned as follows:

Stockholder	No. of Shares
Winslow E. Thompson	10
Bio-Products, Oreg. Ltd.	20
Richard Schroeder	9
Gordon Sloan	3
Winslow E. Thompson, Trustee for Myra G. Carruthers	29
Eben H. Carruthers	29

VI.

The inventions of plaintiff Eben H. Carruthers, which were the subject of the agreements described in Paragraph IV above, had been reduced to practice more than six months prior to the 27th day of May, 1950.

VII.

On February 9, 1951, the plaintiffs filed a joint income tax return for the year 1950 reporting a total net income of $36,927.44 and a tax liability of $10,581.98, which was duly paid. In this return the plaintiffs included as ordinary gross income the total amount of $38,976.75, received from the E. H. Carruthers Company in accordance with Paragraphs 2, 3 and 4 of the contract of May 27, 1950 (Plaintiffs' Exhibit 4).

On October 2, 1951, the plaintiffs filed an amended joint income tax return showing a net income of $28,419.06 and a timely claim for refund on Form 843 for $3,635.92, upon the ground that the amount of $17,016.75 received by plaintiff Eben H. Carruthers in the year 1950 as provided in Paragraph 4 of the contract of May 27, 1950 (Plaintiffs' Exhibit 4) represented profit to him on the sale of patent rights as a long term gain rather than ordinary income to him. Copies of the plaintiffs' original and amended income tax returns and the refund claim which was duly and timely filed are marked herein as plaintiffs' Exhibits 6, 7 and 8, respectively.

VIII.

Plaintiff Eben H. Carruthers received the follow-

ing amounts from the E. H. Carruthers Company during the year 1950 under the provisions of the contract of May 27, 1950:

Amount received as computed under paragraph 2: $8,460.00.

Amount received as computed under paragraph 3: $13,500.00.

Amount received as computed under paragraph 4: $17,016.75.

IX.

Plaintiffs have not received the statutory notice of the disallowance of said refund claim, as provided in Section 3772 (a)(2) of the Internal Revenue Code, but more than six months expired between the filing of said refund claim and the commencement of this action.

Plaintiffs' Contentions

I.

The said inventions and patents constituted either "capital assets", as defined in Section 117(a) of the Internal Revenue Code, or constituted property used in plaintiffs' trade or business, as defined in Section 117(j) of the Internal Revenue Code.

II.

The contract of May 27, 1950 (Plaintiffs' Exhibit 4) and the License Agreement dated May 31, 1950 (Plaintiffs' Exhibit 5) constituted a sale of said inventions and patents within the meaning of Section 117 of the Internal Revenue Code.

III.

The amounts received by plaintiff, Eben H. Carruthers, during the year 1950 as "royalties" from E. H. Carruthers Company, an Oregon corporation, by virtue of said agreements, were within the purview of Section 117 of the Internal Revenue Code and were subject to the limitations of Section 117(b) of the Internal Revenue Code.

IV.

Plaintiffs are entitled to a refund of income taxes paid by them for the year 1950 in the amount of $3,635.92, with interest as provided by law.

Defendant's Contentions

I.

The right granted to the E. H. Carruthers Company was not an absolute assignment which would constitute a sale, but only a license to use patents in the limited field of the tuna industry.

II.

The patents were "property held for sale to customers in the ordinary course of business" and thus were not capital assets under Section 117(a) Internal Revenue Code (26 U.S.C.A. 117 (a)). Therefore, amounts received were ordinary income.

III.

If the patents were capital assets and if there was an absolute assignment which would constitute a sale instead of a license, there was no gain on

such a sale of the patents because under the contract of employment, Paragraph 5, Page 2 thereof, no further consideration was paid by the E. H. Carruthers Company to the plaintiff, Eben H. Carruthers, for this exclusive license to use the patents in the tuna industry other than the amounts paid him under his employment contract of May 27, 1950 and which amounts received were ordinary income.

Issues To Be Determined

I.

Whether or not the rights, limited to the tuna industry, granted by the contract and license agreement (Plaintiffs' Exhibits 4 and 5) constituted an absolute assignment and a sale by Eben H. Carruthers of his patents to E. H. Carruthers Company, or was only a license to use the patents in the tuna industry.

II.

Whether or not the said inventions and patents were held by the plaintiff, Eben H. Carruthers, primarily for sale to customers in the ordinary course of his trade or business.

III.

In the event the Court determines that the patents were capital assets and that there was an absolute assignment which would constitute a sale instead of a license, then the defendant contends that an issue for determination is:

What consideration, if any, was paid by the E. H.

Carruthers Company to the plaintiff, Eben H. Carruthers, for the patent rights.

Exhibits

The following exhibits were introduced at the pretrial conference:

Plaintiffs' Exhibit 1: Copy of agreement dated February 1, 1947, between Eben H. Carruthers and E. H. Carruthers Company.

Plaintiffs' Exhibit 2: Copy of the minutes of Special Meeting of the Stockholders of the E. H. Carruthers Company, held on April 1, 1950.

Plaintiffs' Exhibit 3: Copy of the Minutes of Special Meeting of the Board of Directors of E. H. Carruthers Company held on April 1, 1950.

Plaintiffs' Exhibit 4: Copy of contract dated May 27, 1950, between Eben H. Carruthers and E. H. Carruthers Company.

Plaintiffs' Exhibit 5: Copy of License Agreement dated May 31, 1950, between Eben H. Carruthers and the E. H. Carruthers Company.

Plaintiffs' Exhibit 6: Plaintiffs' Income Tax Return for the year 1950.

Plaintiffs' Exhibit 7: Plaintiffs' Amended Income Tax Return for the year 1950.

Plaintiffs' Exhibit 8: Plaintiffs' Refund Claim.

Plaintiffs' Exhibit 9: Article on patent developments.

Plaintiffs' Exhibit 10: Booklet on Pak-Shaper Process.

Defendant's Exhibit A: Abstract of assignments, agreements, licenses, powers of attorney, and other

instruments in writing found of record by United States Patent Office up to and including August 6, 1952, that may affect all inventions and patents under the name Eben H. Carruthers solely or jointly as inventors.

Defendant's Exhibit B: Patent Applications.

It is agreed by the parties that this pretrial order will govern the course of the trial and will not be amended, except by consent or to prevent manifest injustice.

The Court finding that the foregoing clearly and accurately reflects the pretrial conference had herein and the stipulations and agreements of the parties, hereby ratifies and confirms the foregoing proceedings in all things and does hereby

Order that the said pretrial order be and the same is hereby incorporated into and hereby made a part of the record in this case for the purpose of controlling the course of proceedings on the formal trial hereof before the Court.

Dated this 21st day of November, 1952.

/s/ CLAUDE McCOLLOCH,
District Judge

Approved:

/s/ CHARLES P. DUFFY,
of Attorneys for Plaintiffs
/s/ THOMAS R. WINTER,
of Attorneys for Defendant

[Endorsed]: Filed November 21, 1952.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause, having come on regularly for trial without a jury before the Honorable Claude McColloch, one of the judges of the above-entitled Court, at Portland, Oregon, on the 21st day of November, 1952, plaintiffs appearing by Gordon Sloan and Charles P. Duffy, their Attorneys, and defendant appearing by Fred S. Gilbert, Special Assistant to the Attorney General of the United States, and Thomas R. Winter, Civil Advisory Counsel of the Bureau of Internal Revenue of the United States, and the parties having produced testimony and evidence in behalf of their respective contentions, as reflected by the pretrial order previously made and entered herein; and

The Court, having thereafter considered fully all matters of fact and law presented by the parties and being at this time fully advised, does make the following

Findings of Fact

I.

Plaintiffs instituted this action to recover individual income taxes collected from them by a former Collector of Internal Revenue of the United States for the District of Oregon, for the calendar year 1950. Jurisdiction of this action is based upon Section 1346(a)(1) of Title 28, United States Code.

II.

Plaintiffs are, and at all times material herein were, residents and inhabitants of Clatsop County, Oregon. During the period from September 1, 1947 to November 1, 1952, Hugh H. Earle was the Collector of Internal Revenue for the District of Oregon.

III.

Plaintiffs are, and at all times material herein were, husband and wife.

IV.

On the 27th day of May, 1950 plaintiff Eben H. Carruthers entered into a contract with the E. H. Carruthers Company, an Oregon corporation, (copy of which was admitted herein as plaintiffs' Exhibit 4) and on the 31st day of May, 1950 plaintiff Eben H. Carruthers entered into a "license agreement" with the same corporation (copy of which was admitted herein as plaintiffs' Exhibit 5), under the terms of which he granted to the company "an exclusive license to manufacture, use, sell or lease machinery or to practice any method in accordance with or as set forth in certain United States and foreign patents and applications for patents, together with the right to sub-license others", as more fully stated in the agreement. The exclusive license was "limited to the tuna canning industry", but extended "to the end of the term of any patent listed or to the end of the term of any patent which may issue upon a patent application listed".

V.

The inventions of plaintiff Eben H. Carruthers, which were the subject of the said agreements, had been reduced to practice more than six months prior to the 27th day of May, 1950.

VI.

On February 9, 1951, plaintiffs filed a joint income tax return for the year 1950 reporting a total net income of $36,927.44 and a tax liability of $10,581.98, which was duly paid. In this return the plaintiffs included as ordinary gross income the total amount of $38,976.75, received from the E. H. Carruthers Company in accordance with Paragraphs 2, 3 and 4 of the contract of May 27, 1950 (plaintiffs' Exhibit 4).

On October 2, 1951, the plaintiffs filed an amended joint income tax return showing a net income of $28,419.06 and a timely claim for refund on Form 843 for $3,635.92, upon the ground that the amount of $17,016.75 received by plaintiff Eben H. Carruthers in the year 1950, as provided in Paragraph 4 of the contract of May 27, 1950 (plaintiffs' Exhibit 4) represented profit to him on the sale of patent rights as a long term capital gain rather than ordinary income to him.

VII.

Plaintiffs did not receive a statutory notice of the disallowance of said refund claim, as provided in Section 3772 (a)(2) of the Internal Revenue Code, but more than six months expired between the filing

of said refund claim and the commencement of this action.

VIII.

The license agreement dated May 31, 1950 (plaintiffs' Exhibit 5) constituted an absolute assignment and sale of all of the inventions, applications for patent and patents described therein. The amount of $17,016.75 received by plaintiff Eben H. Carruthers in the year 1950 as "royalties" was in consideration for such assignment and sale.

IX.

The inventions, applications for patent and patents described in said agreement did not constitute property held by plaintiff Eben H. Carruthers primarily for sale to customers in the ordinary course of trade or business.

From the foregoing Findings of Fact, the Court draws the following

Conclusions of Law

I.

The inventions, applications for patent and patents described in said license agreements were capital assets in the hands of plaintiff Eben H. Carruthers.

II.

The contract of May 27, 1950 (plaintiffs' Exhibit 4) and the license agreement dated May 31, 1950 (plaintiffs' Exhibit 5) constituted an absolute assignment and sale of said inventions, applications

for patent and patents, within the meaning of Section 117 of the Internal Revenue Code.

III.

The amounts received by plaintiff Eben H. Carruthers during the year 1950 as "royalties" from E. H. Carruthers Company, an Oregon corporation, by virtue of said agreements, were within the purview of Section 117 of the Internal Revenue Code and were subject to the limitations of Section 117(b) of the Internal Revenue Code.

IV.

By reason of the foregoing, plaintiffs are entitled to recover judgment of and from defendant for the sum of $3,635.92, together with interest thereon, as provided by law, and for their allowable costs and disbursements incurred herein.

Dated this 3rd day of March, 1953.

/s/ CLAUDE McCOLLOCH,
District Judge

Acknowledgment of Service attached.

[Endorsed]: Filed March 3, 1953.

In the United States District Court for the District of Oregon

Civil No. 6486

EBEN H. CARRUTHERS and NANCY CARRUTHERS, Plaintiffs,

vs.

UNITED STATES OF AMERICA, Defendant.

JUDGMENT

This cause, having come on regularly for trial without a jury before the Honorable Claude McColloch, one of the judges of the above-entitled court, at Portland, Oregon, on the 21st day of November, 1952, plaintiffs appearing by Gordon Sloan and Charles P. Duffy, their attorneys, and defendant appearing by Fred S. Gilbert, Special Assistant to the Attorney General of the United States, and Thomas R. Winter, Civil Advisory Counsel of the Bureau of Internal Revenue of the United States, and the parties having produced testimony and evidence in behalf of their respective contentions, as reflected by the pretrial order previously made and entered herein; and

The Court having considered fully all matters of fact and law presented by the parties, and Findings of Fact and Conclusions of Law having been submitted by plaintiffs, which Findings of Fact and Conclusions of Law have heretofore been signed by the Court and entered of record on the 3rd day of March, 1953.

Now, Therefore, based upon the foregoing Findings of Fact and Conclusions of Law,

It Is Hereby Considered, Ordered and Adjudged that plaintiffs have and recover judgment of and from defendant for the sum of $3,635.92, together with interest thereon, as provided by law, and for their allowable costs and disbursements incurred herein.

Dated this 3rd day of March, 1953.

/s/ CLAUDE McCOLLOCH,
District Judge

[Endorsed]: Filed March 3, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Eben H. Carruthers and Nancy Carruthers, plaintiffs, and their attorneys, Gordon Sloan, Carl E. Davidson and Charles P. Duffy:

Notice is hereby given that the United States of America, defendant above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the Judgment entered in this action on the 3rd day of March, 1953, in favor of plaintiffs and against defendant.

Dated this 30th day of April, 1953.

/s/ HENRY L. HESS,
United States Attorney for the District of Oregon
/s/ VICTOR E. HARR,
Assistant United States Attorney

[Endorsed]: Filed May 1, 1953.

[Title of District Court and Cause.]

ORDER

This matter coming on to be heard ex parte this day upon motion of defendant through its attorneys, Henry L. Hess, United States Attorney, and Victor E. Harr, Assistant United States Attorney, for an order extending time for the filing of the record on appeal and docketing the within action in the United States Court of Appeals for the Ninth Circuit, to enable the Department of Justice to have additional time to consider the appeal, and the Court being advised in the premises, it is hereby

Ordered that the time for filing the within appeal and docketing the action be, and it is hereby extended to ninety days from the first date of the Notice of Appeal.

Made and entered at Portland, Oregon, this 2nd day of June, 1953.

/s/ CLAUDE McCOLLOCH,
U. S. District Judge

[Endorsed]: Filed June 2, 1953.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT WILL RELY ON APPEAL

(1) The Court erred in its finding of fact number 8 in finding that the license agreement dated May 31, 1950 constituted an absolute assignment and sale of all of the inventions, applications for patent and patents described therein and that the amount of $17,016.75 received by Eben Carruthers was in consideration of such assignment and sale.

(2) The Court erred in its conclusion of law number 2 in concluding that the contract of May 27, 1950, and the license agreement dated May 31, 1950 constituted an absolute assignment and sale of inventions and applications for patent and patents within the meaning of Section 117 of the Internal Revenue Code.

(3) The Court erred in its conclusion of law number 3 in concluding that the amounts received by plaintiff Eben Carruthers during the year 1950 as "royalties", by virtue of said agreements were within the purview of Section 117 of the Internal Revenue Code and were subject to the limitations of Section 117(b) of the Internal Revenue Code.

(4) The Court erred in its conclusion of law number 4 in concluding that plaintiffs were entitled to recover judgment from the defendant.

(5) The Court erred in entering judgment against the defendant.

/s/ HENRY L. HESS,
United States Attorney

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 19, 1953.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Pursuant to Rule 75, of the Rules of Civil Procedure for the District Courts of the United States, the appellants designate that there be included in the record on appeal the following documents, records and exhibits and other matters required under the rules of this court or of the Court of Appeals for the Ninth Circuit to be so included.

(1) Plaintiffs' complaint.

(2) Defendant's answer.

(3) Pre-trial order dated November 21, 1952.

(4) Transcript of proceedings dated November 21, 1952.

(5) Plaintiffs' Exhibits 1 through 8; Defendant's Exhibits A and B.

(6) Findings of Fact and Conclusions of Law.

(7) Judgment entered March 3, 1953.

(8) Notice of Appeal.

(9) All docket entries.

(10) All orders of this Court relating to preparation of the record, or contents thereon, on appeal, or extensions of time for filing of record, or docketing case on appeal.

(11) Statement of points on which appellant will rely.

(12) This designation.

/s/ HENRY L. HESS,
United States Attorney

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 19, 1953.

[Title of District Court and Cause.]

ORDER

This matter coming on ex parte upon motion of appellant in the above-entitled case for an order directing the Clerk of the above-entitled Court to transmit to the Ninth Circuit Court of Appeals as a part of defendant-appellant's designation of record on appeal, Plaintiffs' Exhibits 1 through 8 and Defendant's Exhibits A and B; and

It appearing to the Court that the parties have stipulated for the transmission of said exhibits, and the Court being advised in the premises; it is

Ordered that the Clerk be and he is hereby au-

thorized and directed to transmit, as a part of defendant-appellant's designation of record on appeal herein, Plaintiffs' Exhibits 1 through 8 and Defendant's Exhibits A and B.

Made and entered this 3rd day of July, 1953.

/s/ CLAUDE McCOLLOCH,
Judge

[Endorsed]: Filed July 3, 1953.

[Title of District Court and Cause.]

DOCKET ENTRIES

1952

June 2—Filed complaint.

June 2—Issued summons—to marshal.

June 3—Filed summons with marshal's return.

Aug. 8—Filed stipulation for order allowing deft. to Sept. 3, 1952, to answer.

Aug. 8—Filed and entered order allowing deft. to Sept. 3, 1952, to answer. McC.

Aug. 28—Filed answer.

Sept. 22—Entered order setting for pre-trial conference on Nov. 17, 1952. S.

Nov. 17—Entered order setting for trial on Nov. 21, 1952. McC.

Nov. 21—Record of trial before court. Plntf. to have 30 days to file brief; 30 days for defendant; 15 days thereafter to plntf. for reply briefs. McC.

1952

Nov. 21—On motion Atty Winters, Fred S. Gilbert, Jr., admitted specially.

Nov. 21—Filed and entered pre-trial order. McC.

Dec. 19—Filed plntfs' brief.

1953

Jan. 21—Filed brief for the United States.

Feb. 5—Filed pltfs' reply brief.

Mar. 3—Filed and entered Findings of Fact and Conclusions of Law. McC.

Mar. 3—Filed and entered judgment for ptff for $3,635.92 with interest and costs. McC.

May 1—Filed notice of appeal by U. S. and copies mailed to attys for plaintiffs.

June 2—Filed motion for extension of time to file record on appeal.

June 2—Filed and entered order extending to 90 days from first date of notice of appeal time to file and docket appeal. McC.

June 19—Filed designation of record on appeal.

June 19—Filed statement of points upon which appellant will rely on appeal.

June 29—Filed transcript of proceedings of Nov. 21, 1953 in duplicate.

July 3—Filed stipulation for order to transmit exhibits on appeal.

July 3—Filed and entered order to transmit exhibits on appeal. McC.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, F. L. Buck, Acting Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Answer; Pre-trial order; Findings of Fact and Conclusions of Law; Judgment; Notice of appeal; Order dated June 2, 1953; Statement of points upon which appellant will rely on appeal; Designation of record on appeal; Order dated July 3, 1953; and Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 6486, in which Eben H. Carruthers and Nancy Carruthers are the plaintiffs and appellants and United States of America is the defendant and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is also enclosed herewith duplicate transcript of proceedings dated November 21, 1952, filed in this office in this cause, together with plaintiffs' exhibits 1 to 8, inclusive, and defendant's exhibits A and B.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 22nd day of July, 1953.

[Seal] /s/ F. L. BUCK,
Acting Clerk

In the United States District Court for the District of Oregon

Civil No. 6486

EBEN H. CARRUTHERS and NANCY CARRUTHERS, Plaintiffs,

vs.

UNITED STATES OF AMERICA, Defendant.

TRANSCRIPT OF TESTIMONY

Portland, Oregon, Friday Nov. 21, 1952, 10:00 o'clock a.m.

Before: Honorable Claude McColloch, Judge.

Appearances: Mr. Charles P. Duffy and Mr. Gordon Sloan, Attorneys for Plaintiffs. Mr. Fred S. Gilbert, Special Assistant to the Attorney General, and Mr. Thomas R. Winter, Civil Advisory Counsel, Bureau of Internal Revenue, Attorneys for Defendant.

* * * * *

EBEN H. CARRUTHERS

one of the plaintiffs herein, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sloan: * * * * *

Q. How did you happen to get started on the tuna machine?

A. While I was employed at the University I had my summers free and came back to the Coast to spend at least a part of my vacations, and at that particular time the tuna canning industry was just beginning to develop, that is, in the Northwest and on the Columbia River and, naturally, being interested in the cannery operations, I visited the canneries and spent considerable time just watching the operations, as a matter of something to do. During that time, just from observation, it seemed to me that there was an awful lot of hand labor in packaging the tuna that in some way could be avoided.

Q. Did you then attempt to build such a machine for that purpose?

A. Well, I just carried the idea in the back of my mind. I struck on what I thought would be a way of doing it, and then at various times from then on I more or less developed this thing in my mind until I got to the point where I thought it would be worth building an experimental machine to see if it would work.

Q. Where did you do that work?

A. I did that at Ithaca. * * * * *

(Testimony of Eben H. Carruthers.)

Q. Was the Pak-C-Lector a successful machine for general commercial use in the field of packing tuna?

A. Well, it was successful to the point that we did have 13 of these machines in actual use and they did produce.

Q. Was it so satisfactory you could put it into high-speed cannery production?

A. Well, it was not satisfactory for what at that time was called the Southern Tuna canning industry because they operated on a much higher production scale than the people in the Northwest were at the time.

Q. By "Southern," you mean those in Southern California or in California?

A. Mostly in and around San Diego.

* * * * *

Q. And that became known by what trade name?

A. That eventually became known as the Pak-Shaper.

Q. And at somewhat the same time did you develop a third machine?

A. Yes, the Pak-Former.

Q. Pak-Former? A. Yes.

Q. Explain to the Court the difference in the purpose of the Pak-Shaper machine and the Pak-Former machine.

A. Well, the Pak-Shaper machine was designed to pack tuna in cans in most any form, primarily in what they call the solid pack or fancy pack form.

When that machine was in operation, we found

(Testimony of Eben H. Carruthers.)

that to pack a different type of pack that the Van Camp Sea Food Company originally wanted to pack —they used it but it would not give them exactly the results they wanted, and it resulted in a variation or what finally developed into another machine to handle this exact type of what they called the chunk pack eventually.

* * * * *

Q. Mr. Carruthers, do the patents just referred to in this license agreement have any substantial value for any other purpose other than the processing of tuna fish?

A. No established value that I know of.

Q. Has any attempt ever been made to use them for any other purpose?

Mr. Winter: Don't lead him.

A. No.

Mr. Sloan: You may examine the witness.

Cross Examination

By Mr. Gilbert: * * * * *

I believe you have before you Defendant's Exhibit B-1 to B-16, which are copies of various patents.

I wish you would refer to Patent 2,601,093. Will you tell me what that refers to? It refers to one of your canning machines, evidently, but I couldn't tell whether it is the Pak-C-Lector or Pak-Shaper or Pak-Former.

A. What is the number?

Q. Serial No. 20894. The date is June 17, 1952.

A. What is the patent number?

(Testimony of Eben H. Carruthers.)

Q. 2,601,093.

A. Yes. I have it here.

Q. I wish you would refer to your description of that patent, the text of the description, and read it for the benefit of the Court, the first two paragraphs of that description.

A. "My invention relates to a method and means or a machine for packing a predetermined weight of bulk product.

"While the method and machine of my invention has been particularly designed for the packing of a predetermined bulk and thereby weight of tuna in a container, it has other uses in the packing of various fish products that may be adaptable to the packing of other bulk products such as some vegetables, for example sauerkraut and spinach, and certain meat products which are packed in bulk."

Q. Is that not true of all of these patents which counsel and you have referred to as being applicable to the tuna industry?

A. That is true, I think, in every patent; that is put in in case it is later found that they have that practicable operation you are not limited in scope. I think that is just a technical patent application.

Q. It is true, however, that in each application for a patent, any patent concerned here in your license agreement, you made the specific representation that it could have other uses other than the packing of tuna?

A. It could. There is no doubt but what it could.

(Testimony of Eben H. Carruthers.)

Q. And in some or in several of them you refer to specific industries, such as you do here, the packing of vegetables, sardines, salmon or other types of fish?

A. That is correct. Wherever there is the slightest possibility, whether it is proven or unproven, it is the usual procedure in patent specification writing to include it, and that does not in the slightest mean—we did not have to have any proof that the patent would actually work on those products, as far as the patent office is concerned.

Q. You would not have made such a representation unless you thought the patent had application in another industry?

A. I certainly thought the possibility existed that there could be, yes.

Mr. Gilbert: That is all, your Honor.

* * * * *

[Endorsed]: Filed June 29, 1953.

PLAINTIFFS' EXHIBIT No. 1

AGREEMENT

This Agreement made this 1st day of Feb., 1947, by and between Eben H. Carruthers, of Gearhart, Oregon, (hereinafter known as the "Licensor"); and E. H. Carruthers Company, a corporation organized and existing under the laws of the State of Oregon: (hereinafter known as the "Licensee")

Witnesseth:

Whereas, the Licensor has the entire right, title

Plaintiffs' Exhibit No. 1—(Continued)

and interest in and to the following applications for Letters Patent or inventions about to be filed in the United States Patent Office.

Method and Apparatus for Packing Products; Ser. No. 689,146; filing date August 8, 1946.

Method and Apparatus for Selectively Packing Products of Variable Weight; Ser. No. 444,510; filing date May 26, 1942.

Expansible and Contractible Means; Ser. No. 446,697; filing date Nov. 23, 1942.

Machine for Packing Products; Ser. No. 531,491; filing date April 17, 1944.

Apparatus for Packing Products of Variable Weight; Ser. No. 556,803; filing date Oct. 2, 1944.

Guillotine and Method of Cutting or Slicing Materials; Ser. No. 640,512; filing date Jan. 11, 1946.

Machine for forming and packing Flake Materials.

Apparatus for Forming Flake Materials.

Method of and Apparatus for Selectively Packing Products of Variable Weight; Ser. No. 428,319; Canadian Pat. issued June 27, 1945.

Apparatus for Packing Products of Variable Weight; Ser. No. 598,880; filing date June 11, 1945.

Whereas, the Licensor desires to transfer the right to manufacture, lease or operate machines developed by reason of such patents and inventions to the Licensee for the better development and exploitation of the same; and

Whereas, the Licensee is desirous of acquiring an

Plaintiffs' Exhibit No. 1—(Continued)

exclusive license in and to said applications for Letters Patent and inventions; and

Whereas, the Licensee is desirous of negotiating a loan from the Reconstruction Finance Corporation for the purpose of enabling it to carry on the business of manufacturing, leasing or selling machinery, and the Licensor is desirous of placing the Licensee in a position to negotiate said loan.

Now, Therefore, for and in consideration of the sum of One Dollar ($1.00) each to the other in hand paid and other good and valuable considerations and the mutual performance of the undertakings herein set forth, it is agreed by and between the parties hereto as follows:

First: The licensor hereby grants to the licensee an exclusive non-transferable license under all of the above set forth applications and inventions together with the exclusive right to manufacture, use, sell, lease or rent machines in accordance with said applications and inventions, said exclusive license to extend throughout the United States and all foreign countries.

Second: The exclusive license above set forth shall extend throughout the term of any loan which may be negotiated with the Reconstruction Finance Corporation, but after said loan has been fully repaid, the exclusive character of this license shall terminate and the licensor shall be free to license others under said applications and inventions together with the right to license such others to manu-

Plaintiffs' Exhibit No. 1—(Continued)

facture, use, sell, lease or rent machines made in accordance with said applications and inventions.

Third: The parties recognize that under the terms of any loan which may be negotiated with the Reconstruction Finance Corporation, the payment of any royalties or other compensation by the Licensee to the Licensor during the term of said loan, may be restricted and it is therefore impossible or undesirable for the parties to this agreement at this time to agree upon the royalties payable to the Licensor for the exclusive rights granted herein. It is therefore contemplated by the parties that no fixed schedules of license fees shall be set forth herein but that the parties will, from time to time during the term of said loan, agree on a reasonable royalty and consult with the Reconstruction Finance Corporation to determine what, if any, payments in consideration of this license can be made. The parties further agree that upon the re-payment of said loan to the Reconstruction Finance Corporation, the parties will negotiate a royalty agreement which shall be fair to both Licensor and Licensee based in general on the net profits which the Licensee may derive from the manufacture, use, sale, lease or rental of machines in accordance with said applications and inventions.

Fourth: This agreement shall not be assignable or transferrable by the Licensee except to the successor or assignee of substantially the entire business of the Licensee, and not without the prior

Plaintiffs' Exhibit No. 1—(Continued)

written consent of the Licensor first had and obtained.

In Witness Whereof, the parties hereto have executed this Agreement on the day and year first above written.

EBEN H. CARRUTHERS,

E. H. CARRUTHERS COMPANY

By EBEN H. CARRUTHERS,
President

[Seal] By RICHARD SCHROEDER,
Secretary

State of Oregon,
County of Clatsop—ss.

Be It Remembered, that on this 19th day of May, A. D. 1947 before me, the undersigned, a Notary Public in and for said County and State, personally appeared the within named Eben H. Carruthers who is known to me to be the identical individual described in and who executed the within instrument and acknowledged to me that he executed the same freely and voluntarily.

In Testimony Whereof, I have hereunto set my hand and official seal the day and year last above written.

[Seal] GORDON SLOAN,
Notary Public for Oregon. My Commission expires 9/15/48.

Plaintiffs' Exhibit No. 1—(Continued)

State of Oregon,
County of Clatsop—ss.

On this 19th day of May, 1947, before me appeared Eben H. Carruthers and Richard Schroeder both to me personally known, who being duly sworn, did say that he, the said Eben H. Carruthers, is the President, and he, the said Richard Schroeder, is the Secretary of E. H. Carruthers Company, the within named Corporation, and that the seal affixed to said instrument is the corporate seal of said Corporation, and that the said instrument was signed and sealed in behalf of said Corporation by authority of its Board of Directors, and Eben H. Carruthers and Richard Schroeder acknowledged said instrument to be the free act and deed of said Corporation.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal, this the day and year first in this, my certificate, written.

[Seal] GORDON SLOAN,
Notary Public for Oregon. My Commission expires 9/15/48.

Know All Men By These Presents, That E. H. Carruthers Company, for and in consideration of the granting of a loan by the Reconstruction Finance Corporation to E. H. Carruthers Company does, by these presents, set over and assign unto Reconstruction Finance Corporation all of its interest in and to the within Agreement or License from

Plaintiffs' Exhibit No. 1—(Continued)

Eben H. Carruthers to E. H. Carruthers Company. That such assignment shall continue in full force and effect until such loan shall have been paid in full.

E. H. CARRUTHERS COMPANY
By EBEN H. CARRUTHERS,
President
[Seal] By RICHARD SCHROEDER,
Secretary

Full and complete consent is hereby given to the above Assignment of the within Agreement.

EBEN H. CARRUTHERS

PLAINTIFFS' EXHIBIT No. 2

SPECIAL MEETING OF THE STOCKHOLDERS

A special meeting of the Stockholders of the E. H. Carruthers Company was held at the office of the Company on Saturday, April 1, 1950, at the hour of 2:00 p.m. pursuant to notice to all of the Stockholders. The meeting was called to order by E. H. Carruthers, the President of the Company, and upon roll being taken it was determined that the following Stockholders were present:

E. H. Carruthers, being the owner of 29 shares of stock;

Richard Carruthers, being the representative of the Bioproducts Company, the owners of 20 shares of stock;

Plaintiffs' Exhibit No. 2—(Continued)

Winslow E. Thomson, being the owner of 10 shares of stock;

Richard Schroeder, being the owner of nine shares of stock;

Gordon Sloan, being the owner of three shares of stock.

In addition to Mr. Richard Carruthers, Bioproducts was also represented by Mr. James Hope, attorney at law. Mr. Richard Carruthers stated that Mr. Hope was acting as counsel for him in representing the interests of Bioproducts and would advise him as to their interests during the course of the meeting.

Thereupon, it was announced by Richard Schroeder, the Secretary, that he had sent notice to Myra Carruthers, the beneficial owner of 29 shares of the stock advising her of the time, place and date of meeting, and informing her that E. H. Carruthers would not attempt to vote her stock at this particular meeting, and that she would have the right to designate any person that she chose to attend the meeting in her place.

No person attended in the place of Myra Carruthers and she was not personally present.

Mr. Winslow Thomson then announced that he has been checking his records immediately prior to coming to Astoria for the meeting, and he had discovered that in filing some of the patent applications he had inadvertently filed with the applications an assignment from Mr. Carruthers to the Company; that it had not been his intention so to

Plaintiffs' Exhibit No. 2—(Continued)

do. He stated that he was well aware that it was not nor never had been the intention of either Carruthers or the Company that such patents should be assigned to it.

The designation of the actual applications and patents that had been assigned to the E. H. Carruthers Company was not immediately available but it was considered by the Stockholders and all Stockholders present were of the opinion that such patents should be re-assigned to Mr. Carruthers. It was acknowledged on the part of all Stockholders that at the time the Company was formed, it had not been the intention of the Company to attempt to own the patents.

Mr. Thomson then explained that if Mr. Carruthers retained title to the actual patents and granted an exclusive license to manufacture to the Company to use, sell or lease machinery in accordance with said patents that the Company would thereby have all the practical advantage of ownership of the patents, and title to the patents would not be subject to or jeopardized by an infringement suit against the Company. Motion was made and seconded that the Board of Directors should take immediate steps to see that the patents that had inadvertently been assigned to the Company and issued in the Company name be re-assigned to Mr. E. H. Carruthers, and that any applications that were filed in the name of the Company or which were inadvertently assigned to the Company should be withdrawn or the assignment made from the

Plaintiffs' Exhibit No. 2—(Continued)

Company back to E. H. Carruthers, and that he should retain the actual title to the patents. That such was for the best protection of the patents, and thereby, to the best interests of the Company. The motion was unanimously carried.

Thereupon, the President stated that the principal purpose of the meeting was to consider and definitely determine the relationship between the Company and him. That he had expended the past five years actually working for the Company and that the Company actually had the advantage of the previous five years of his best efforts and endeavors before the Company was formed, and for which he had not been paid. He also stated that he had come to the conclusion that it was necessary that his status in respect to the Company should be definitely fixed. Mr. Carruthers then stated that in order to bring the matter to issue he desired to state that there were three principal things that he desired if he was to continue to devote the substantial part of his time to the Company. In the first instance, he desired that he be paid a guaranteed monthly salary. Second, that he be paid a royalty for the use of the patents in the form of a fixed percentage of the gross receipts of the Company, and third, that he be paid a lump sum of approximately $25,000.00, to be paid to him over a period of years, for the past use of the exclusive license to manufacture, use, sell and lease machinery under various of his patents which the Company had enjoyed and for which he had received

Plaintiffs' Exhibit No. 2—(Continued)

no consideration whatsoever. That in addition to this, he desired the right to retain all rights to inventions which he should develop that were not connected with the tuna industry. He stated he was willing that as to any inventions which he might make that were of use in the tuna industry, the Company should have exclusive rights in the tuna industry. That any other patents or rights in other industries should be his. That he would be willing to grant to the Company a right to purchase the patent or acquire an exclusive license to the use of the patent, but he would not continue to work and develop such patents or patentable ideas or products and have the Company automatically share in the same without consideration to him.

Thereupon, Mr. Richard Schroeder stated that he was in accord with the President, and that for the benefit of the rest of the Stockholders he desired to give a brief review of the work that Eben Carruthers had performed for the Company. He then stated that Mr. Carruthers had started his development work in about 1939 or 1940, and that from that date to this he had devoted subsantially his entire time and energy to such development. That at the time he started he was a professor at Cornell University and that after he had worked for a long time upon his first machine, which afterwards became the "Pak-C-Lector", he came to the west coast in 1943, and thereafter he has devoted his entire time to the development of the various machines from which the Company now derives its income.

Plaintiffs' Exhibit No. 2—(Continued)

That during the period from 1943 to 1948 his income from the Company was a bare sustaining wage, and actually if computed upon an hourly rate would average about $1.50 per hour. That at no time has Mr. Carruthers ever worked an eight-hour day, but that he has consistently worked ten, 12 and 14 hours a day and for the most part six and usually seven days a week. That during this period of time Mr. Carruthers received numerous opportunities of employment by large industries particularly during the war years. That he could have received upwards of $1,000.00 a month as compensation from many of such concerns but this he refused and continued to devote his entire effort to these machines. That in addition to designing and creating the various machines from which the Company now derives benefit, Mr. Carruthers for the most part actually constructed the same with his own hands. That during these formative years the Company had no means by which it would pay sufficient help and Mr. Carruthers did the actual building himself with little help. That as a result the only consideration that Mr. Carruthers has actually ever received from the Company would no more than pay him an average low hourly rate of the actual labor he has expended. That at no time has Mr. Carruthers received from the Company so much as one dime for the basic idea which he had developed, and that the Company through all of these years has had the benefit of an exclusive license to manufacture, use, sell and lease the machinery of the inventions involved but

Plaintiffs' Exhibit No. 2—(Continued)

not any consideration has ever been paid to Mr. Carruthers therefor.

Mr. Schroeder further stated that at the time the Company negotiated a loan with the Reconstruction Finance Corporation, it was necessary for Mr. Carruthers to make a blanket commitment to the Company as to all his then patents and patent applications. This commitment was in the form of an exclusive license to manufacture and use the various patents and patent applications that Mr. Carruthers then had. At that time this commitment included the various "Pak-C-Lector" patents as well as the applications for the "Pak-Former." Mr. Schroeder stated that this agreement provided that when the R. F. C. loan was paid off, the Company was obligated to negotiate with Mr. Carruthers for adequate payment therefor. Such negotiation was never had and no consideration has ever been paid to Mr. Carruthers. The Company has had the exclusive license to use these inventions and patents for the entire period without any consideration. That in addition the Company had had the use and benefit of the "Pak-Shaper" patents and patent applications without any consideration being paid to Mr. Carruthers at any time, and that the principal income derived from the Company now comes from the "Pak-Former" and "Pak-Shaper" patents and patent applications and the machinery embodying such inventions. Mr. Schroeder then stated that he felt that the consideration stated by Mr. Carruthers would be fair, and that the same should be agreed

Plaintiffs' Exhibit No. 2—(Continued)

to, and the Company should enter into a contract with Mr. Carruthers for the benefit of Eben and his family without further delay.

There then followed approximately three hours' discussion upon this proposal. The same was opposed in various features by several of the Stockholders. Mr. Richard Carruthers, in behalf of Bioproducts, together with his attorney, expressed the belief it was intended at the outset of the Company that Mr. Eben Carruthers was to devote his entire time to the Company and the Company was to have the advantage of these patents without additional consideration. Mr. Eben Carruthers stated such was not the fact and that in the event the Company did not see fit to enter into a contract along the lines suggested by him, that he would either move that the Company be sold, and he was certain the same could be sold, or that he would not devote any further time to the Company, but that he would cease working for the Company and would work for himself in such fields as he would desire to enter into. Eben Carruthers stated that he would not continue to work for the Company until his rights in respect of the Company were definitely settled and determined. After prolonged discussion and consideration, Mr. Schroeder made the following motion:

Be It Resolved that the Board of Directors of the Company be, and they hereby are, directed to enter into a contract with E. H. Carruthers whereby the

Plaintiffs' Exhibit No. 2—(Continued)

Company and Mr. Carruthers should agree as follows:

1. That E. H. Carruthers shall receive a guaranteed salary of not less than $705.00 per month or in such other increased amount as the Board of Directors shall from time to time determine. Provided, however, that at any time the Board of Directors are considering his salary Mr. E. H. Carruthers shall not vote as a Director.

2. E. H. Carruthers shall receive an annual bonus at the discretion of a majority of the Board of Directors.

3. E. H. Carruthers shall be paid eight per cent (8%) of the gross receipts of the E. H. Carruthers Company resulting from any machine upon which he controls patents, exclusive, however, of any unearned advance to the Company for construction costs. Such payments shall be made to E. H. Carruthers or to his heirs or estate for so long as any income from any such machines shall continue to be received by the Company.

4. E. H. Carruthers shall retain the full title and all rights to any and all future inventions and patents developed by him, except those having reference to the tuna industry. In respect to any inventions or patents pertaining to the tuna industry, the Company shall have an exclusive license to manufacture, use, sell or lease machinery in accordance with the same for the tuna industry without further consideration other than the consideration herein fixed and determined. In respect of all other

Plaintiffs' Exhibit No. 2—(Continued)

inventions, patents and rights, the E. H. Carruthers Company shall have the first option to purchase an exclusive license to the manufacture, use, sale or lease of any machine, device or apparatus resulting from any such patents developed by said E. H. Carruthers at any time. That such option will grant to the E. H. Carruthers Company an opportunity to acquire the same for a fair and reasonable consideration to be agreed upon at such time as it shall be established that any such patent is for a commercially practicable machine, device, method or other apparatus. But in no event shall the E. H. Carruthers Company be required to pay to E. H. Carruthers for such exclusive license any greater sum or amount than E. H. Carruthers could receive from any other bona fide offer by any other person for such an exclusive license. And further provided, that in the event E. H. Carruthers Company shall expend any cost, technical assistance or other service to E. H. Carruthers for the development of any such patent the Company shall have a twenty per cent (20%) interest in the proceeds of such sale of any such patent or patent rights.

5. That such contract shall be entered into immediately and become in full force and effect from and after June 1, 1950.

The motion was seconded and after considerable additional discussion the matter was put to a vote. Of the Stockholders present, all the Stockholders, save and except Mr. Thomson, voted in favor of the motion. Mr. Thomson voted against the motion and

Plaintiffs' Exhibit No. 2—(Continued)

stated that he desired to explain his vote for in his opinion the contract proposed would not grant to E. H. Carruthers sufficient consideration or payment for his past services that the contract was fair perhaps for the future, but did not adequately provided valid consideration for the use that the Company had had of the various patent rights during the past several years. Mr. Eben Carruthers stated that he would be satisfied with such a contract and would be willing to enter into such a contract with the Company.

There being no further business to come before the meeting, the meeting adjourned.

RICHARD SCHROEDER,
Secretary

PLAINTIFFS' EXHIBIT No. 3

SPECIAL MEETING OF THE BOARD OF DIRECTORS

A special meeting of the Board of Directors of the E. H. Carruthers Company was held at the office of Gordon Sloan in the Spexarth Building, Astoria, Oregon, immediately following the special meeting of the Stockholders on April 1, 1950. All of the Directors were present.

Mr. Schroeder said that it was necessary that the Company should fix and determine any bonus that should be paid to E. H. Carruthers for the preceding fiscal year through June 1, 1949 to May 31, 1950. After considerable discussion of the present

Plaintiffs' Exhibit No. 3—(Continued)

status of the Company, it was agreed that the Company should pay to Mr. Carruthers the sum of $13,500.00 for such bonus. Upon motion being duly made and seconded, the same was unanimously passed.

The next order of business was the consideration of the payment of a dividend to the Stockholders. Upon giving careful consideration to the financial conditions of the Company, it was determined that a total dividend payment of $5,000.00 to be paid to the Stockholders at the rate of $50.00 per share for each share of stock held by every Stockholder would be proper. Upon motion being duly made and seconded, the Directors unanimously approved the payment of such a dividend.

It was then considered that Mr. Thomson had been paid no salary during the past year and that such salary should be fixed and paid to him. Upon various discussion and careful consideration, it was determined that a salary at the rate of $625.00 per month, beginning June 1, 1949 and continuing to May 31, 1950, would be satisfactory and adequate. Upon motion being duly made and seconded, it was determined that such salary should be paid to him.

The Directors considered the motion approved at the Stockholders' meeting in regard to a Contract with E. H. Carruthers and directed the Vice-President and Secretary to have prepared and enter into a contract as directed by the Stockholders.

The officers were likewise instructed to take immediate steps to assign all patents and applications therefor to E. H. Carruthers.

Plaintiffs' Exhibit No. 3—(Continued)

There being no further business to come before the meeting, the meeting adjourned.

.....

Secretary

PLAINTIFFS' EXHIBIT No. 4

CONTRACT

This Agreement made and entered into this 27th day of May, 1950, by and between E. H. Carruthers, hereinafter designated "Carruthers", and E. H. Carruthers Company, an Oregon Corporation, hereinafter designated "Company";

Witnesseth:

That, Whereas, since the original organization of the Company, Carruthers has devoted his entire time, energy and abilities to the success and welfare of the Company and has heretofore granted to the Company an exclusive right or license to the use and benefit of certain of the inventions and patents developed by Carruthers, and which licenses have been and will continue to be of substantial value to the Company and for which Carruthers has never received any consideration; and

Whereas, on February ....., 1947 Carruthers granted to the Company an exclusive license to manufacture, use, sell and lease machinery under the then patents and patent applications owned by him, and that, in fact, the Company has had the use and benefit of additional patents and patent applications. That the terms and conditions of such

Plaintiffs' Exhibit No. 4—(Continued)

Agreement of February .., 1947 have never been performed by the Company, and it is the desire of both parties hereto that the present and future rights in respect of such patents be definitely fixed and determined; and

Whereas, it is contemplated that Carruthers shall in the future endeavor to develop other inventions and patents, it is necessary that the respective rights of the parties be fixed with respect thereto.

Now, Therefore, in consideration of the covenants and agreements herein contained and of the previous, use, benefit and profit that the Company has heretofore received, as above set forth, and, likewise, in consideration of the rights herein extended to the Company to acquire an interest in the various machines, means, apparatus or devices that may be patented by Carruthers in the future, it is agreed by and between the parties hereto as follows:

1. That in consideration of the payments to be made to him by the Company and other agreements herein contained, Carruthers does hereby covenant and agree he shall hereafter devote to the Company a substantial part of his time to the building and improving of the various machines that shall be developed and built by the Company under licenses that Carruthers has heretofore and may hereafter grant to the Company, and that he shall otherwise devote his best efforts to the general welfare of the Company.

2. The Company agrees that it shall pay to Carruthers a guaranteed monthly salary presently fixed

Plaintiffs' Exhibit No. 4—(Continued)

at the rate of $705.00 per month. That such amount may be increased but not decreased at the discretion of the Board of Directors. Provided, however, that Carruthers agrees that as a member of the Board of Directors he shall not exercise his vote at any meeting of the Board of Directors when his salary is under consideration.

3. That Carruthers shall, if the circumstances of the Company permit, be paid an annual bonus to be paid at the time and in the amount fixed by a majority of the Board of Directors.

4. The Company shall pay to Carruthers an amount equal to eight per cent (8%) of the gross receipts of E. H. Carruthers Company resulting from any machines upon which Carruthers controls the patents. Provided however, that such gross receipts shall not include the unearned advances made to the Company for construction costs by various other persons. Such payments shall be made to Carruthers and to his heirs, personal representatives or assigns for so long as any income from such machines shall continue to be received by the Company.

5. Carruthers shall retain all patent rights whatsoever in all past and future inventions developed by him, save and except such inventions or improvements which have reference to the tuna industry in respect of which the Company shall have the right to an exclusive license to manufacture, use, sell or lease any machine, device, method or apparatus to the tuna industry under such patents without

Plaintiffs' Exhibit No. 4—(Continued)

further consideration from the company to Carruthers other than the consideration set forth in the preceding three paragraphs. In respect of any other inventions developed by Carruthers, the Company shall have and is hereby granted a first option to purchase from Carruthers an exclusive license to manufacture, use, sell or lease any machine, device, method or apparatus resulting from any invention other than those in respect of the tuna industry obtained by Carruthers. Such option shall be exercised in the following manner: At such time as Carruthers shall determine that he has developed a commercially practicable invention, he shall notify the Company. The Company shall then pay to Carruthers such fair and reasonable consideration as may then be agreed upon, but that such consideration shall not in any event exceed the amount of any other bona fide offer, if any, that shall have been or may then be received by Carruthers for such an exclusive license. Provided, further, that in the event the Company shall expend any cost, technical assistance or other service to Carruthers in the development of any such invention, the Company shall then have a twenty per cent (20%) interest in the proceeds of the sale or licensing of such patent or patent rights in the event Carruthers shall sell or assign the same to some other person or shall grant a license to some other person. In the event the Company shall not exercise the option herein granted within sixty (60) days from the date it receives notice from Carruthers such option shall

Plaintiffs' Exhibit No. 4—(Continued)

terminate, and Carruthers shall be free to sell such patent or to grant an exclusive or non-exclusive license thereto to any other person for such consideration as Carruthers shall deem fit and proper, subject to the then interest, if any, of the Company in such invention as herein provided.

The benefits of this Agreement shall inure to and the obligations shall be binding upon the parties hereto, their heirs, successors and assigns.

Witness the hand and seal of the parties hereto the day and year first above mentioned. That such Agreement is entered into by and on behalf of the Company by its Vice President and Secretary pursuant to the authority and direction of its Board of Directors.

[Seal] .....

E. H. CARRUTHERS COMPANY

[Seal] By .....

Vice President

[Seal] By .....

PLAINTIFFS' EXHIBIT No. 5

LICENSE AGREEMENT

This License Agreement made and entered into this 31st day of May, 1950 by and between Eben H. Carruthers of Warrenton, Oregon (hereinafter designated "Carruthers") and E. H. Carruthers Co., a corporation organized and existing under the laws of the State of Oregon (hereinafter designated "Company"):

Plaintiffs' Exhibit No. 5—(Continued)

Witnesseth:

Whereas, Carruthers is the owner of the entire right, title and interest in and to certain patents and applications for patents, both domestic and foreign; and

Whereas, the Company is desirous of obtaining certain rights under said patents and applications for patents; and

Whereas, the parties have heretofore entered into a certain agreement dated May 27, 1950 hereinafter called "employment agreement" whereby the parties hereto undertake certain mutual obligations and responsibilities and this License Agreement is made pursuant to said employment agreement;

Now, Therefore, in consideration of said employment agreement, it is agreed by and between the parties hereto as follows:

1. Carruthers hereby grants to the Company an exclusive license to manufacture, use, sell or lease machinery or to practice any method in accordance with or as set forth in the following United States and foreign patents and applications for patents, together with the right to sublicense others:

Applications in the name of Eben H. Carruthers:

Ser. No. 689,146; filed Aug. 8, 1946; title: Method and Apparatus for Packing Products.

Ser. No. 774,625; filed Sept. 17, 1947; title: Apparatus for Forming and Compressing Materials.

Ser. No. 774,626; filed Sept. 17, 1947; title:Method and Apparatus for Packing Flake Materials.

Ser. No. 121,172; filed Oct. 13, 1949; title: Ma-

Plaintiffs' Exhibit No. 5—(Continued)

chine for Packing a Pre-determined Weight of Bulk Products.

Ser. No. 640,512; filed Jan. 11, 1946; title: Guillotine and Method of Cutting or Slicing Materials.

Ser. No. 20,894; filed April 14, 1948; title; Method and Machine for Packing a Predetermined Weight of Bulk Products.

Ser. No. 39,274; filed July 17, 1948; title: Method of Packing Materials in Containers, Particularly Fish Products and Product Produced Thereby.

Ser. No. 131,392; filed Dec. 6, 1949; title: Hopper Construction for Food Packing Machines.

Applications in the name of Eben H. Carruthers and Ernest M. Cameron: Ser. No. 115,814; filed Sept. 15, 1949; title: Guillotine and Method of Cutting Materials.

Application in the name of Jesse E. Whittington: Ser. No. 139,854: filed Jan. 21, 1950: title: Guillotine and Method of Cutting Materials.

Application in the name of Eben H. Carruthers: (Canadian) Ser. No. 586,598; filed April 12, 1949; title: Method and Machine for Packing a Predetermined Weight of Bulk Product.

Patents in the name of Eben H. Carruthers:

Patent No. 2,490,945: issued Dec. 13, 1949: title: Apparatus for Weighing and Sorting Articles.

Patent No. 2,475,422; issued July 5, 1949: title: Machine for Packing Products.

Patent No. 2,470,976; issued May 24, 1949; title: Apparatus for Packing Products of Variable Weight.

Plaintiffs' Exhibit No. 5—(Continued)

Patents in the name of Eben Hunter Carruthers:

Patent No. 2,470,916; issued May 24, 1949; title: Method and Apparatus for Selectively Packing Products of Variable Weight.

Patent No. 2,434,607; issued Jan. 13, 1948; title: Expansible and Contractible Means for Compressing and Shaping a Yielding Pliant Mass.

Patent No. 428,319 (Canadian); issued June 27, 1945; title: Method and Apparatus for Selectively Packing Products of Variable Weight.

Foreign applications in the name of Eben Hunter Carruthers, corresponding to U. S. application Serial No. 20,894 filed April 14, 1948:

Union of S. Africa: No. 797/49, patent issued April 13, 1949; No. 7983, patent issued Nov. 28, 1949.

Philippine Islands.

Australia: No. 27046/49; patent issued April 14, 1949.

New Zealand: No. 101358; patent issued April 13, 1949.

Japan: No. 3713/49; patent issued April 13, 1949.

Mexico: No. 27,520; patent issued April 13, 1949.

Portugal: No. 27,283; patent issued April 13, 1949.

2. The exclusive license set forth above is limited to the tuna canning industry but shall extend to the end of the term of any patent listed or to the end of the term of any patent which may issue upon a patent application listed, except that this license agreement (including paragraph 3 hereof) shall terminate in the event the Company fails to meet the obligations on its part to be performed as set forth

Plaintiffs' Exhibit No. 5—(Continued)

in the employment agreement heretofore mentioned.

3. Carruthers is also the owner of the entire right, title and interest in and to United States application for letters patent No. 119,467 filed Oct. 4, 1949 and entitled "Apparatus for Packing Food Products". Carruthers acknowledges that the Company has extended technical assistance and other services to Carruthers in the development of a machine or machines in accordance with said application and that pursuant to paragraph 5 of said employment agreement, the Company has a 20% interest in the proceeds of the sale or the income from any licensing of such application or any patent or patents to issue thereon. Carruthers further acknowledges that such application or the patent or patents to issue thereon are subject to the option agreement set forth in paragraph 5 of said employment agreement.

Witness the hand and seal of the parties hereto the day and year first above written. That such Agreement is entered into by and on behalf of the Company by its Vice-President and Secretary pursuant to the authority and direction of its Board of Directors.

[Seal] EBEN H. CARRUTHERS

E. H. CARRUTHERS CO.

[Seal] By WINSLOW E. THOMSON
Vice-President

[Seal] By RICHARD SCHROEDER
Secretary

DEFENDANT'S EXHIBIT A

* * * * *

Instrument dated April 7, 1948 (acknowledged). Recorded Apr. 14, 1948. Liber R 215 page 31.

Eben H. Carruthers to E. H. Carruthers Co., Warrenton, Oreg., corp. of Oregon.

Eben H. Carruthers, Inventor. Method and Machine for Packing a Predetermined Weight of Bulk Product. Appln. exctd. Apr. 7, 1948. Pat. 2,601,093. June 17, 1952.

Assigns entire right, title and interest in the invention described in said application.

Instrument dated May 31, 1948 (acknowledged). Recorded July 17, 1948. Liber T 216 page 196.

Eben H. Carruthers to E. H. Carruthers Co., Warrenton, Oregon, corp. of Oregon.

Eben H. Carruthers, Inventor. Method of Packing Materials in Containers, Particularly Fish Products and Product Produced Thereby. Appln. exctd. May 31, 1948.

Assigns entire right, title and interest in the invention described in said application.

Instrument dated Mar. 31, 1949 (acknowledged). Recorded Apr. 23, 1949. Liber X 219 page 260.

Eben H. Carruthers to E. H. Carruthers Co., Warrenton, Oreg., corporation of Oregon.

Eben H. Carruthers, Inventor. Apparatus for Selectively Packing Products of Variable Weight. Appln. exctd. May 22, 1942. Filed May 26, 1942. Ser. No. 444,510. Pat. 2,470,916. May 24, 1949.

Defendant's Exhibit A—(Continued)

Assigns entire right, title and interest in the invention described in said application.

Instrument dated Mar. 31, 1949 (acknowledged). Recorded Apr. 23, 1949. Liber X 219 page 261.

Eben H. Carruthers to E. H. Carruthers Co., Warrenton, Oreg., corp. of Oregon.

Eben H. Carruthers, Inventor. Apparatus for Packing Products of Variable Weight. Appln. exctd. June 5, 1945. Filed June 11, 1945. Ser. No. 598,880. Pat. 2,470,976. May 24, 1949.

Assigns entire right, title and interest in the invention described in said application.

Instrument acknowledged May 31, 1949. Recorded June 7, 1949. Liber K-220, page 540.

Eben H. Carruthers to E. H. Carruthers Co., Warrenton, Oreg. corporation of Oreg.

Eben H. Carruthers, Inventor. Machine for Packing Products. Appln. exctd. Apr. 6, 1944. Filed Apr. 17, 1944 S. N. 531,491. Pat. 2,475,422—July 5, 1949.

Assigns entire right, title and interest in the invention set forth in said application.

Instrument dated Sept. .., 1949. Acknowledged Sept. 7 and 10, 1949. Recorded Sept. 15, 1949. Liber L-221, page 616.

Eben H. Carruthers and Ernest M. Cameron to E. H. Carruthers Co., Warrenton, Oreg., Corporation of Oreg.

Eben H. Carruthers and Ernest M. Cameron, In-

Defendant's Exhibit A—(Continued)

ventors. Guillotine and Method of Cutting Materials. Appln. exctd. Sept. 7, 1949.

Assign entire right, title and interest in the invention described in said application.

Instrument acknowledged Nov. 30, 1949. Recorded Dec. 6, 1949. Liber H-222, page 446.

Eben H. Carruthers to E. H. Carruthers Co., Warrenton, Oreg., Corporation of Oreg.

Eben H. Carruthers, Inventor. Hopper Construction for Food Packing Machines. Appln. exctd. Nov. 30, 1949. Pat. 2,602,579—July 8, 1952.

Assigns entire right, title and interest in the invention described in said application.

Instrument acknowledged May 27, 1950. Recorded June 8, 1950. Liber J-224, page 127.

E. H. Carruthers Co. Corporation of Oreg., to Eben H. Carruthers, Warrenton, Oreg.

Eben H. Carruthers, Inventor. Method and Apparatus for Selectively Packing Products of Variable Weight. May 24, 1949, 2,470,916. Apparatus for Packing Products of Variable Weight. May 24, 1949, 2,470,976. Machine for Packing Products, July 5, 1949, 2,475,422. Method and Machine for Packing a Predetermined Weight of Bulk Products, filed Apr. 14, 1948, Ser. No. 20,894, Pat. 2,601,093, June 17, 1952. Method of Packing Materials in Containers, Particularly Fish Products and Product Produced Thereby, filed July 17, 1948, Ser. No. 39,274. Hopper Construction for Food Packing Machines,

Defendant's Exhibit A—(Continued)

filed Dec. 6, 1949, Ser. No. 131,392, Pat. 2,602,579, July 8, 1952.

Eben H. Carruthers and Ernest M. Cameron, Inventors. Guillotine and Method of Cutting Materials. Filed Sept. 15, 1949, Ser. No. 115,814.

Also another invention of another inventor.

Recites that by inadvertence or mistake certain patents or applications were assigned by Assignee to Assignor and that Assignor desires to correct said error.

Assignor assigns its entire right, title and interest in and patents and applications.

Certification attached.

DEFENDANT'S EXHIBIT B-9

Patented May 24, 1949 2,470,916

United States Patent Office—2,470,916

Apparatus for Selectively Packing Products of Variable Weight. Eben Hunter Carruthers, Ithaca, N. Y., assignor to E. H. Carruthers Co., Warrenton, Oreg., a corporation of Oregon. Application May 26, 1942, Serial No. 444,510. 18 Claims. (Cl. 209—121).

My invention relates to a sorting and selecting method and apparatus for use in the packing of a plurality of products or articles of variable weight in a single container. While the method and apparatus of my invention may have other uses, it has primarily been originated for use in the tuna industry. Reference is made to my abandoned copending

Defendant's Exhibit B-9—(Continued)

application Serial No. 398,460, filed June 17, 1941, entitled Apparatus for selectively packing products of variable weight of which the present application is a continuation in part.

The present practices in the tuna industry employed in packing the fish are time consuming and expensive. The precooked fish are carefully split lengthwise into their natural quarter sections. These sections are then, after being cleaned, sliced perpendicular to their lengths into pieces of a length somewhat less than the heighth of the can or other container in which they are to be packed. It will be appreciated, since the tuna vary in size, that the quartered sections vary in size and weight. Moreover, each fish varies in cross sectional area from head to tail. These two factors result in pieces of tuna which, although of uniform length, vary greatly in size and weight.

In the present method of packing the pieces are brought to the packing employees on large trays. With the size of cans at present employed two or more (usually three or four) pieces of tuna are required to fill the can. The packer selects, for example, two pieces which partially fill the can and then attempts, judging from the space remaining, to fill the can by selecting a third piece which will fill the can. This preferably should not be done by breaking the third piece to the proper size since the price of tuna is, to a large extent, dependent on the size of the pieces. Scraps, small and broken pieces, are sold at an appreciable discount.

Defendant's Exhibit B-9—(Continued)

The selection of a third or fourth piece to fill the can requires the exercise of judgment. Moreover, this judgment is based on size alone without regard to the weight of the pieces. While the weight is to a large extent a function of the size of the piece, it is difficult for the packer to judge the size by inspection. For this reason, after the can is filled, it must be checked for weight. If the weight does not fall within predetermined limits, a small piece of fish must be taken out or added as the particular case may require. This operation is time consuming and results in further handling and breakage of the pieces.

* * * * *

DEFENDANT'S EXHIBIT B-10

Patented Jan. 13, 1948 2,434,607

United States Patent Office

2,434,607

Expansible and Contractible Means for Compressing and Shaping a Yielding Pliant Mass. Eben Hunter Carruthers, Ithaca, N. Y. Application November 23, 1942, Serial No. 466,697. 6 Claims. (Cl. 226—101).

My invention relates to expansible and comtractible means or what might be termed a chucking device. While the chucking device of my invention may have other uses, the apparatus has been designed particularly for use in the compacting and

Defendant's Exhibit B-10—(Continued)

shaping of a plurality of somewhat pliant articles so that they may be shaped and conformed to a can or other container for the purposes of packing the articles.

Reference is made to my copending applications Serial No. 398,460, filed June 17, 1941, and since abandoned, and Serial No. 444,510, filed May 26, 1942, both entitled Method and apparatus for selectively packing products of variable weight.

In the above mentioned applications I have shown and described a method and machine adapted to sort a plurality of articles of variable weight; and select from the sorted articles a plurality of articles whose combined weight equals substantially the desired weight to be packed in a can or other container. The machine of the above mentioned applications also includes an expansible and contractible device in which the selected somewhat pliant pieces are placed so as to be shaped and compacted for the purpose of conforming the mass of articles to the shape of the can or container which they are to occupy, together with means for transferring the shaped and compacted articles to the cans.

The present invention relates to improvements in the expansible and contractible device or the conforming and shaping apparatus of the above mentioned applications. While the present invention may have other uses, it has been particularly designed for use in the packing of tuna or other materials which are more or less yielding and pliant so that the mass formed by the plurality of pieces

Defendant's Exhibit B-10—(Continued)

may be pressed, shaped and conformed to the container which they are to occupy.

An object of my invention is to provide an expansible and contractible device or chucking apparatus, of simple construction, which is particularly suited to conform and shape a pliant mass so that it may be packed in a can or other container.

Another object of my invention is to provide a shaping and conforming apparatus capable of conforming a plurality of pieces of tuna to the shape of a can or other container without the necessity of placing the pieces of tuna in any particular manner within the shaping and conforming apparatus.

My invention further contemplates the provision of a chucking device having two opposed jaws or article engaging surfaces which are movable relative to each other to and from a contracted position, together with a second pair of jaws or article engaging surfaces which are also movable toward and from a contracted position under the control of and regulated by the first mentioned jaws to thus provide an expansible and contractible device which acts with equal force on all sides of the mass so as to propertly and accurately shape the mass and condition it for delivery to a can or other container. * * * *

DEFENDANT'S EXHIBIT B-11

Patented July 5, 1949 2,475,422

United States Patent Office

2,475,422

Machine for Packing Products. Eben H. Carruthers, Warrenton, Oreg., assignor to E. H. Carruthers Co., Warrenton, Oreg., a corporation of Oregon. Application April 17, 1944, Serial No. 531,491. 16 Claims. (Cl. 226—101).

My invention relates to a machine for packing articles, particularly articles of variable weight, in a container to the end that the total weight of the articles or material in the container may be substantially predetermined. Reference is made to my copending applications, Serial No. 398,460, filed June 17, 1941, and now abandoned; Serial No. 444,-510, filed May 26, 1942, now Patent No. 2,470,916, dated May 24, 1949, and Serial No. 466,697, filed November 23, 1942, now Patent No. 2,434,607, dated Jan. 13, 1948. The apparatus of my invention has other uses but, for purposes of illustration, it will be described and has been originated primarily for use in the tuna packing industry.

The present practices in the tuna industry employed in packing the fish are both time consuming and expensive. The pre-cooked fish are carefully split lengthwise into their natural quarter sections. These sections are then, after being cleaned, sliced perpendicular to their lengths into pieces of a length somewhat less than the height of the can or other container into which they are to be packed. It will

Defendant's Exhibit B-11—(Continued)

be appreciated since the tuna vary in size that the quartered sections vary in size and weight. Moreover, each fish varies in cross section from head to tail. These two factors, after quartering and slicing, result in pieces of tuna which although of uniform length vary greatly in size and weight.

The present hand method of packing tuna is entirely a hand labor operation requiring a large number of reasonably skilled operators. Moreover, the tuna is broken up by reason of excessive handling and fitting of the pieces during packing and these broken pieces must be sold at a substantial discount. In my copending applications, Serial Nos. 398,460 and 444,510, I have shown and described a method and apparatus for selectively packing products, in particular, tuna, wherein the articles are weighed and segregated into separate compartments in accordance with their weight. A plurality of pieces of tuna are then automatically selected from a plurality of the weight groups which will make up the predetermined weight desired to be placed in the container. Following this operation the container is filled with, for example, the three or four pieces selected. The present invention relates to the packing end of the machine of the above mentioned copending applications.

An object of my invention is to provide a machine for packing a plurality of articles in a can or other container.

* * * * *

DEFENDANT'S EXHIBIT B-12

Patented Dec. 13, 1949 2,490,945

United States Patent Office
2,490,945

Apparatus for Weighing and Sorting Articles. Eben H. Carruthers, Warrenton, Oreg. Application October 2, 1944, Serial No. 556,803. 11 Claims. (Cl. 209—121).

My invention relates to apparatus for packing products of variable weight. Reference is made to my copending applications, Serial No. 398,460, filed June 17, 1941, now abandoned and Serial No. 444,-510, Patent No. 2,470,916 filed May 26, 1942, both entitled Method and apparatus for selectively packing products of variable weight.

In the above mentioned applications I have shown and described a method and machine particularly adapted for although by no means limited to the packing of tuna. In the machines of the above inventions, the tuna after being quartered are cut into pieces, weighed and sorted into separate groups or compartments. A plurality of pieces of tuna are then selected automatically which have a predetermined combined weight with which a can is to be filled. The pieces are then packed in a can or other suitable container.

The present invention relates to improvements in the weighing mechanism and is suitable for use in a machine of the general type shown in the above mentioned copending applications. While the mechanism of the present invention will be described

Defendant's Exhibit B-12—(Continued)

in connection with the packing of tuna, it will be understood that the invention has broader application and may be used generally.

An object of my invention is to provide an improved weighing and sorting mechanism.

Another object of my invention is to provide a sensitive and accurate weighing mechanism, in combination with a sorting mechanism, capable of performing the weighing operation and sorting the articles while the articles being weighed are in motion.

A further object of my invention is to provide a weighing mechanism which is rapid in action whereby the articles being weighed may be maintained in continuous motion and so that when an article passes over the scale or weighing arm the operation of the rapid or snap action weighing mechanism is capable of actuating mechanism for displacing the article being weighed off the scale or weighing arm at the proper time.

* * * * *

DEFENDANT'S EXHIBIT B-13

Patented Nov. 20, 1951 2,575,703

United States Patent Office

2,575,703

Method for Packing Food Products. Eben H. Carruthers, Warrenton, Oreg. Application August 8, 1946, Serial No. 689,146. 8 Claims. (Cl. 99—171).

Defendant's Exhibit B-13—(Continued)

My invention relates to a method of and apparatus for packing or canning materials or products, particularly food products, which may vary in weight, such as fish. While the method and apparatus of my invention will be described particularly in connection with the packing or canning of tuna fish, it will be appreciated that my invention has application to the packing of other food products where the product is susceptible of moulding or compacting. The method and apparatus has particular application to the packing of other fish products such as salmon or sardines.

An object of my invention is to provide an improved method and apparatus, particularly adapted to the packing or canning of fish such as tuna.

Another object of my invention is to provide a method and means of packing fish, particularly tuna, which eliminates the present necessity of cutting each loin of fish separately transversely of the loin into pieces corresponding to the height of the can into which the pieces are to be packed and the subsequent packing of the individual cut pieces into the can in which the tuna is to be marketed.

Another object of my invention is to provide a method and apparatus for canning fish wherein weighing mechanism is provided adapted to feed the fish loins for subsequent packing operations at a substantially uniform weight rate per unit of distance, or at intervals of time proportional to their weight.

* * * * *

DEFENDANT'S EXHIBIT B-14

Patented June 17, 1952 2,601,093

United States Patent Office

2,601,093

Method and Apparatus for Packaging a Predetermined Weight of Food Material. Eben H. Carruthers, Warrenton, Oreg. Application Apr. 14, 1948, Serial No. 20,894. 48 Claims. (Cl. 99 188).

My invention relates to a method and means or machine for packing a predetermined weight of bulk product.

While the method and machine of my invention has been particularly designed for the packing of a predetermined bulk and thereby weight of tuna in a container, it has other uses in the packing of various fish products and may be adaptable to the packing of other bulk products such as some vegetables, for example sauerkraut and spinach, and certain meat products which are packed in bulk.

Until recently, tuna fish has been packed by hand, the loins of tuna being cut transversely of the fish into pieces the height of the can. The packer then taking three or four pieces, attempted to fit these pieces into a can to provide a predetermined desired weight of tuna. In my copending application, Serial Number 444,510, filed May 26, 1942, now Patent Number 2,470,916 issued on May 24, 1949, I have shown a machine for weighing the pieces of tuna; separating them into groups in accordance with their weight; then combining three or more pieces to obtain a predetermined weight of tuna; and then

Defendant's Exhibit B-14—(Continued)

packing that predetermined weight of fish in a can. The method and machine of that application is now in successful use in a number of canneries.

In my application Serial Number 689,146, filed August 8, 1946, now Patent Number 2,575,703 issued on November 20, 1951, and entitled "Method for Packing Food Products," I have sought to provide a method for packing tuna and other products which would eliminate the necessity of cutting the loins of tuna into chunks or pieces approximately the height of the container in which the tuna is to be packed and the elimination of the necessity of weighing the individual small pieces of tuna with the purpose of increasing production and further cutting down labor costs.

In the machine of the last mentioned application, whole loins are individually and accurately weighed and then fed to a compressing and molding tube in accordance with their weight. That is the loins are fed into the molding tube at a weight rate which is substantially constant per unit length of the conveyor which feeds the loins into the forming and molding section of the machine. After the loins of tuna have been formed into a cylindrical elongated roll of substantially constant weight per unit of length, sections of the roll are cut off and successively transferred to the containers in which the tuna is to be packed. The present invention seeks further simplification of the process of packing tuna set forth in my co-pending application Serial Number 689,146. * * * * *

DEFENDANT'S EXHIBIT B-15

Patented Sept. 4, 1951 2,567,052

United States Patent Office

2,567,052

Method and Apparatus for Packing Flake Materials. Eben H. Carruthers, Warrenton, Oreg. Application September 17, 1947, Serial No. 774,626. 38 Claims. (Cl. 226—103).

My invention relates to a method and apparatus for packing flake materials and, while not limited to this purpose, has been primarily developed for the purpose of packing flake tuna fish.

An object of my invention is to provide an efficient machine adapted to compress or form flake tuna into a cake and pack such tuna in a can which when opened by the user presents an attractive homogeneous appearance.

Another object of my invention is to provide a method of packing moist flaky materials in which a compression chamber is loosely filled with such materials, thereafter the materials are pre-compressed to form a mass of uniform density, then the mass is trimmed to a desired volume to arrive at a mass of the desired weight, and thereafter the mass is compressed to form a cake of sufficient cohesiveness and rigidity that the cake will retain its cake form during packing in a can and maintain such form until the can is emptied for use.

A further object of my invention is to provide a machine adapted to compress flake tuna or other materials capable of being compressed into a cake

Defendant's Exhibit B-15—(Continued)

and pack a substantially uniform predetermined weight of such materials into a can.

My invention further contemplates the provision of a machine which includes a series of compression chambers which may be filled with a predetermined volume or weight of tuna in flake form and compressed into a cake and then transferred to a can, the compression of the tuna being sufficient and its cohesiveness being such that when in the can, with oil, upon opening the can and inverting it, the cake of tuna will drop out of the can as a whole cake.

Other objects and advantages of my invention will be set forth in the claims and will be apparent from the following description, when taken in connection with the accompanying drawings, in which:

* * * * *

DEFENDANT'S EXHIBIT B-16

Patented July 8, 1952 2,602,578

United States Patent Office

2,602,578

Apparatus for Packing Materials. Eben H. Carruthers, Warrenton, Oreg. Application March 29, 1951, Serial No. 218,209. 29 Claims. (Cl. 226—96).

My invention relates to apparatus for packing materials.

The machine of this invention will be described primarily in connection with the packing of socalled flake and chunk packs of tuna fish. However, with

Defendant's Exhibit B-16—(Continued)

adaptations and modifications, the machine may be employed in connection with the packing of other products of a semi-flowable or non-flowable nature particularly meat products. The principles of the machine may also have application in the packing of other food products such for example, as cut string beans and non-food products such as cosmetics.

Reference is made to my co-pending application Serial No. 774,626, now Patent No. 2,567,052, filed September 17, 1947, and entitled "Method and Apparatus for Packing Flake Materials."

Reference is also made to my co-pending applications Serial Nos. 39,274, filed July 17, 1948, entitled "Method of Packing Materials in Containers Particularly Fish Products and Product Produced Thereby"; 131,392, filed December 6, 1949, entitled "Hopper Construction for Food Packing Machines"; and 774,625 (now abandoned) filed September 17, 1947, entitled "Apparatus for Forming and Compressing Materials."

In my application Serial No. 774,626, I have described and claimed a method and machine for packing products particularly tuna fish in which the tuna in a flake or chunk condition is fed to the machine. The tuna is filled into pockets or cylinders which are continuously moved through a path of travel. Force is applied to the product at some point during the filling operation to fill voids, expel air

Defendant's Exhibit B-16—(Continued)

and insure a substantially uniform homogeneous fill of the pockets. This may be done by a force filling of the pockets, a precompressing of the product or a combination of these actions. After the force filling operation which in practice overfills the pocket, the size of the pocket is reduced by an amount which may be adjusted and the excess trimmed or removed to bring the amount of tuna in the pocket to the desired predetermined weight to be placed in the contrainer to be filled. Thereafter, in the case of tuna, compression forces are applied to compress the tuna into a cake or slug of the desired dimensions for deposit in the container. The tuna is of a moist oily nature and I have found that, after compression, it will retain approximately the dimensions to which it was compressed and that if the cake is made slightly smaller in diameter than the container, an annular space is provided around the cake for the reception of oil to protect the tuna during retorting. Moreover, when the container is opened, the container may be inverted and the cake will usually drop out as a whole cake of approximately the dimensions to which it was compressed.

* * * * *

[Endorsed]: No. 13,932. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Eben H. Carruthers and Nancy Carruthers, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: July 24, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13,932

UNITED STATES OF AMERICA,
Appellant,

vs.

EBEN H. CARRUTHERS and NANCY CARRUTHERS, Respondents.

STATEMENT OF POINTS AND DESIGNATION OF RECORD ON APPEAL

The United States of America, appellant in the above-entitled case, adopts the Statement of Points filed in the United States District Court for the District of Oregon, as the Statement of Points to be Relied Upon in this court, and in accordance with Rule 17(6) of the Rules of the United States Court of Appeals, Ninth Circuit, desires that portion of the Designation of the Record on Appeal heretofore

filed in the United States District Court for the District of Oregon, pursuant to Rule 75 of the Federal Rules of Civil Procedure, to be printed as follows:

1. Plaintiffs' complaint.

2. Defendant's answer.

3. Pre-Trial Order dated November 21, 1952.

4. Page 34, beginning with the third line, and Page 35 of the Transcript of Proceedings dated November 21, 1952.

5. Plaintiffs' Exhibits No. 1 through 5; of defendant's Exhibit A, pages 4 through 6; of defendant's Exhibit B, we wish only certain statements from eight of the patent applications, as follows:

The heading and paragraph one of page one of Patent No. 2,470,916, Apparatus for Selectively Packing Products of Variable Weight.

The heading and paragraphs one and two of page one of Patent No. 2,602,578, Apparatus for Packing Materials.

The heading and paragraph one of page one of Patent No. 2,475,422, Machine for Packing Products.

The heading and paragraphs one, two and three of page one of Patent No. 2,490,945, Apparatus for Weighing and Sorting Articles.

The heading and paragraphs one, two, three and four, page one of Patent No. 2,434,607, Expansible and Contractible Means for Compressing and Shaping a Yielding Pliant Mass.

The heading and paragraphs one, two and three,

page one, of Patent No. 2,567,052, Method and Apparatus for Packing Flake Materials.

The heading and paragraph one, page one, of Patent No. 2,575,703, Method for Packing Food Products.

The heading and paragraphs one and two, page one, of Patent No. 2,601,093, Method and Apparatus for Packaging a Predetermined Weight of Food Material.

6. Finding of Fact and Conclusions of Law.

7. Judgment entered March 3, 1953.

8. Notice of Appeal.

9. All docket entries.

10. All orders of this Court relating to preparation of the record, or contents thereon, on appeal, or extensions of time for filing of record, or docketing case on appeal.

11. Statement of points on which appellant will rely.

12. Designation of Record on appeal.

Dated at Portland, Oregon, this 30th day of July, 1953.

/s/ VICTOR E. HARR,
Assistant United States Attorney
for the District of Oregon,
Of Attorneys for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed Aug. 3, 1953. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLEES' DESIGNATION OF RECORD ON APPEAL

Come now the Appellees and, in accordance with the provisions of Rule 17(6) of the Rules of the United States Court of Appeals for the Ninth Circuit, designate the following additional portions of the record to be printed:

1. The following portions of the Transcript of Proceedings dated November 21, 1952:

(a) The last two lines on page eight and to and including the answer, "I did that at Ithaca", on page nine.

(b) Beginning with the third line of page fourteen and continuing to and including the answer, "Mostly in and around San Diego", on the same page.

(c) Beginning with the question, "And that became known by what trademark?", on page 21, and continuing to (but not including) the last two lines on that page.

(d) The last three lines on page 27 and the first five lines of page twenty-eight.

2. The next three paragraphs in each of the patent applications following the paragraphs of defendants' Exhibit B designated by Appellant.

Dated at Portland, Oregon, this 6th day of August, 1953.

/s/ CHARLES P. DUFFY,
Of Attorneys for Appellees.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Aug. 8, 1953. Paul P. O'Brien, Clerk.

No. 13932

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

EBEN H. CARRUTHERS and
NANCY CARRUTHERS,
Appellees.

On Appeal from the United States District Court
for the District of Oregon

BRIEF FOR THE APPELLEES

GORDON SLOAN,
CARL E. DAVIDSON,
CHARLES P. DUFFY,
Attorneys for Appellees.

GLASS-KEYSTONE PRESS

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In the United States
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No. 13932

UNITED STATES OF AMERICA,
Appellant,

vs.

EBEN H. CARRUTHERS and
NANCY CARRUTHERS,
Appellees.

On Appeal from the United States District Court
for the District of Oregon

BRIEF FOR THE APPELLEES

PRELIMINARY STATEMENT

On May 31, 1950, Eben H. Carruthers granted "an exclusive license to manufacture, use, sell or lease machinery or to practice any method in accordance with or as set forth in" certain "United States and foreign patents and applications for patents, together with the right to sublicense others" to the E. H. Carruthers Company, a corporation, as

more fully stated in the agreement (Plaintiffs' Exhibit 5; R. 57-61). The exclusive license was "limited to the tuna canning industry" but extended "to the end of the term of any patent listed or to the end of the term of any patent which may issue upon a patent application listed". (R. 17) During the remaining part of the year 1950 Eben H. Carruthers received the sum of $17,016.75 from the E. H. Carruthers Company for such exclusive license. (R. 18) Appellant now concedes the fact that these patents were capital assets in the hands of appellee Eben H. Carruthers and that they were held by him for more than six months prior to May, 1950, so that the sole question presented to this Court is whether the District Court erred in determining that such amounts constituted proceeds from the sale of a capital asset and, therefore, taxable as long-term capital gains to appellees on their joint income tax return for that year, as provided in Section 117 of the Internal Revenue Code, rather than being taxable to them as ordinary income, under the provisions of Section 22(a) of the Internal Revenue Code, as contended by appellant.

APPELLEES' CONTENTIONS

Appellees contend, and the trial court so found, (R. 19-20) that:

1. The contract of May 27, 1950 (R. 53-57) and the license agreement dated May 31, 1950 (R. 57-61) constituted an absolute assignment and sale of said inventions,

applications for patent and patents, within the meaning of Section 117 of the Internal Revenue Code.

2. The amounts received by appellee Eben H. Carruthers during the year 1950 as "royalties" from E. H. Carruthers Company, an Oregon corporation, by virtue of said agreements, were within the purview of Section 117 of the Internal Revenue Code and were subject to the limitations of Section 117(b) of the Internal Revenue Code.

ARGUMENT

Under the provisions of Title 35, United States Code, Patents, Section 40, a patentee is granted, for the term of seventeen years, "the exclusive right to make, use and vend the invention or discovery . . . throughout the United States and the Territories thereof." Section 47 of the same Title authorizes the assignment of patent rights.

The "license agreement" of May 31, 1950 (Plaintiffs' Exhibit 5; R. 57) granted to the company "an exclusive license to manufacture, use, sell or lease machinery, or to practice any method in accordance with or as set forth in" certain "United States and foreign patents and applications for patents, together with the right to sublicense others", as more fully stated in the agreement. The exclusive license was "limited to the tuna canning industry", but extended "to the end of the term of any patent listed or to the end of the term of any patent which may issue upon a patent

application listed". We submit that Mr. Carruthers thereby assigned and sold the entire bundle of rights which he had, except the bare legal title, and that the transaction was not a mere licensing agreement as contended by the Commissioner of Internal Revenue.

One of the earliest discussions of this problem was in the case of *Waterman v. Mackenzie* (1890) 138 U. S. 252. This was a patent infringement suit in which Justice Gray, at Page 256, made the following statement:

> "Whether a transfer of a particular right or interest under a patent is an assignment or a license does not depend upon the name by which it calls itself, but upon the legal effect of its provisions. For instance, a grant of an exclusive right to make, use and vend two patented machines within a certain district, is an assignment, and gives the grantee the right to sue in his own name for an infringement within the district, because the right, although limited to making, using and vending two machines, excludes all other persons, even the patentee, from making, using or vending like machines within the district."

The opinion of the Supreme Court in the *Waterman* case was the basis for the decision of the Tax Court of the United States in the case of *Edward C. Myers v. Commissioner* (1946) 6 T.C. 258. In that case the Tax Court stated the general rule to be that the profit realized upon the grant of an exclusive license to make, use and sell an invention or

a patent constituted a capital gain rather than ordinary income.

The *Myers* case was decided in 1946 and has been uniformly followed by the courts and by the Tax Court since that time. *Hofferbert, Collector, v. Briggs* (CCA 4) 178 F. 2d 743; *Allen, Collector v. Werner* (CCA 5) 190 F. 2d 840; *Kronner v. United States* (Ct. Cl.) 110 F. Supp. 730; *Herwig v. United States* (Ct. Cl.) 105 F. Supp. 384; *Pike v. United States* (DC, Conn.) 101 F. Supp. 100; *Thompson v. Johnson, Collector* (DC, N.Y., 1950) 42 American Federal Tax Reports 1284; *Lamar v. Granger* (DC, Pa.) 99 F. Supp. 17; *Dreyman v. Commissioner* 11 T.C. 153; *Taylor v. Commissioner* 16 T.C. 376.

Apparently the appellant seeks to avoid the impact of these decisions by contending that the exclusive license granted here did not constitute a sale, within the meaning of Section 117 of the Internal Revenue Code, because it was limited to the tuna canning industry. We submit, however, that if an item of property is a capital asset then each divisible part of it is likewise a capital asset. If the right conveyed is exclusive as to manufacture, sale and use, then the fact that such rights are retained, as to other parts of the patent, should not have any significance. We believe that this is supported by the following authorities, among others: *Kavanaugh, Collector v. Evans* (CCA 6) 188 F. 2d 234; *Herwig v. United States* (Ct. Cl.) supra; *Lamar v. Granger,*

supra, at pages 36-7; *Seattle Brewing & Malting Co. v. Commissioner* 6 T.C. 856; and *Parke, Davis & Company v. Commissioner* 31 B.T.A. 427.

From their inception, the machines in question here were designed solely to pack tuna fish and nothing else. (R. 31-33). Before considering the authorities on this question, we should note the following testimony (R. 33):

> "Q. Mr. Carruthers, do the patents just referred to in this license agreement have any substantial value for any other purpose than the processing of tuna fish?
>
> A. No established value that I know of.
>
> Q. Has any attempt ever been made to use them for any other purpose?
>
> * * * * *
>
> A. No."

In *Kavanaugh v. Evans,* supra, Evans granted an exclusive license to the Kelsey-Hayes Wheel Company on his patent covering a four wheel brake, but reserved to himself the use of the invention in connection with a projected development by him of a short brake pedal, and the right to assign such privilege to one other person. The Circuit Court of Appeals for the Sixth Circuit concurred in the opinion of the District Judge that "the properties sold by the appellee were capital assets and that the profits thereon were taxable as such", and stated:

> "It does not matter that appellee retained the rights set forth in Section 4. It was entirely lawful for him to retain an undivided part or share of his exclusive patent rights. (citing cases)".

In the *Parke, Davis & Company* case, supra, the Tax Court treated the assignment of one-half of the beneficial interest in a patent as a capital transaction.

Two of the above cited cases involved copyrights rather than patents, but we believe that the reasoning therein is applicable to the divisibility of patent rights. The *Herwig* case involved the sale of the movie rights to the book "Forever Amber" to a film producer after the sale of the book rights to a publishing company. The Court of Claims, in rejecting the contention of the Commissioner of Internal Revenue that a copyright is an indivisible asset and that the owner thereof cannot secure capital gains treatment upon the sale of a part thereof, concluded:

> "We believe that it is not only logical but also practical and just to consider the exclusive and perpetual grant of any one of the 'bundle of rights' which go to make up a copyright as a 'sale' of personal property rather than a 'mere license' ".

The Tax Court, in the *Seattle Brewing & Malting Co.* decision, accorded capital gains treatment to the grant of an exclusive right to use the trade name "Rainier" solely within the State of Washington and the Territory of Alaska.

The Commissioner of Internal Revenue, having been defeated in the courts in his attempt to avoid the general rule first announced in the *Myers* case, supra, has sought remedial legislation in the past. During the drafting of the 1950 Revenue Act, the House of Representatives attempted to deny capital gains treatment to the gains from the sale of patents and inventions. The Senate deleted this provision, however, and the House receded on its proposal. The report of the Senate Finance Committee (No. 2375, August 22, 1950) stated that:

> "The desirability of fostering the work of such inventors outweighs the small amount of additional revenue which might be obtained under the House bill, and therefore the words 'invention', 'patent' and 'design' have been eliminated from this section of the bill".

CASES CITED BY APPELLANT

On pages 8 and 9 of appellant's brief, there are cited a number of cases dealing with the distinction between the assignment of a patent and a bare license thereof. These cases, for the most part, reiterate the general principles enunciated by the Supreme Court in the early case of *Waterman v. Mackenzie,* supra. Some of these cases are patent infringement suits rather than tax cases, and some of the tax cases involved the application of sections of the Internal Revenue Code relating to the taxing of amounts received

by non-resident aliens. Many of the cases cited by appellant held that the "license agreement" involved therein constituted an assignment and sale rather than a bare license, and we believe that several of these cited cases directly support appellees' position.

Other than *Waterman v. Mackenzie,* supra, which is the leading case on this general subject and which we have heretofore cited and discussed, the appellant first cites the case of *United States v. General Electric Co.,* 272 U. S. 476. That decision was rendered in an anti-trust suit brought by the government and merely restates the general rule of the *Waterman* case, with which we have no quarrel.

Six Wheel Corporation v. Sterling Motor Truck Co., 50 F. 2d 568, a 1931 decision of this Court, was a patent infringement suit in which the question was whether or not the plaintiff assignee had the right to sue. This Court held that the purported assignment, which was hedged with numerous conditions and did not give the purported assignee the right to make, use and sell, did not give the plaintiff therein the right to prosecute the infringement suit. This Court discussed, in general terms, the rights which an inventor has under the patent laws and followed the general principles of the *Waterman* case.

Gregg v. Commissioner, 18 T. C. 291, which was affirmed per curiam by the Circuit Court of Appeals for the Third Circuit, 203 F. 2d 954, involved a license to manu-

facture and sell rope sole shoes in the United States for a term of one year, with automatic yearly renewals subject to cancellation by either party. If the licensee could not meet the demand for the product, then the taxpayer could exercise his reserved right to license others. The agreement in question there also provided that a suit for infringement could be brought by either party. The Tax Court properly held that this was not equivalent to a sale of the patent.

Broderick, Collector v. Neale (CCA 10) 201 F. 2d 621, involved two license agreements. The first agreement was for one year, only, and did not include the right of the licensee to use the patent. This short term license was held not to be an assignment, but it is interesting to note that the government did not appeal the decision of the District Court that an effective assignment was made by the second agreement, which was for the life of the patents.

Bloch v. United States (CCA 2 1952) 200 F. 2d 63, was carefully distinguished by the Court of Claims in its decision in *Kronner v. United States,* 110 F. Supp. 730, which was also cited by appellant. The Court of Claims pointed out the fact that in the Bloch case the question involved was whether royalty payments received by a non-resident alien represented taxable income to him under Section 211(a) of the Internal Revenue Code, and stated that it "must be distinguished from our case wherein a resident citizen and Section 117 are involved".

Just why appellant cites *Allen v. Werner* and *Kavanaugh v. Evans* in support of its position is not clear, inasmuch as these are two of the strongest cases supporting the position of the appellees. We have previously cited and discussed these cases.

Hook v. Hook & Ackerman (CCA 3 1951) 187 F. 2d 52, was a declaratory judgment suit involving a claimed infringement of a patent. The agreement in question there was held to be an assignment rather than a license, under the general rule announced in the *Waterman* case.

The next two cases cited by appellant, like *Bloch v. United States,* supra, involved the taxing of non-resident aliens. *Commissioner v. Celanese Corporation* (CCA DC 1944) 140 F. 2d 339; and *General Aniline & Film Corporation* (CCA 2 1944) 139 F. 2d 759. Sections 143 and 211(a) of the Internal Revenue Code require that any "fixed or determinable" income paid to non-resident aliens from within the United States be withheld at the source. The regulations of the Commissioner of Internal Revenue describe royalties as such income, but exclude the gain from the sale of property by non-resident aliens where the sale is made outside the United States. *Regulations 111, Sections 29.143-2 and 29.211-7.* For these reasons it becomes important for the Commissioner in those cases to establish the fact that a license was granted, rather than a sale made, by the non-resident alien patent owner if a tax is to be imposed.

At least a gain on a sale of a patent right by a citizen will be taxed at capital gains rates. A sale by a non-resident alien, however, is entirely exempt from taxation if the transaction is consummated in a foreign country.

Under the facts in the *Celanese Corporation* case, the agreement was held to be a sale, not a license, and the taxpayer's position was upheld. The decision of the Tax Court in favor of the government in the *General Aniline & Film Corporation* case was reversed by the Court of Appeals for the Second Circuit. Here, again, the citation of this case by the government, in support of its position, is a source of wonder, particularly in view of the fact that the Court of Appeals, in finding an assignment and holding in favor of the taxpayer, said that it was unimportant "that the assignor, before making the assignment, had granted to others some rights under the patent". Even though these cases involved Section 117 of the Internal Revenue Code, they would not be helpful to appellant here.

The last case cited by appellant is *Kenyon v. Automatic Instrument Co.* (CCA 6, 1947) 160 F. 2d 878. This was not a tax case, but was a suit to recover damages for breach of an agreement to pay royalties. Appellees believe that this case has no application to the instant case, even though the agreement in that case was held to be an assignment rather than a license.

On pages 9 and 10 of appellant's brief the statement is made that the taxpayer first assigned some of the patents involved to the company and, thereafter, at a special meeting of the stockholders, it was decided to reassign the patents to the taxpayer. In emphasizing this transaction, the appellant is endeavoring to piecemeal and segregate a small part of the entire record. Consideration of the minutes of the stockholders' meeting on April 1, 1950 (Plaintiffs' Exhibit 2; R. 42-43) will disclose the fact that such assignments were made by inadvertence and, had they been otherwise, all of the patents and applications involved would have been assigned and not just the few that were. There was never any consideration paid to Mr. Carruthers for either the agreement of 1947 (Plaintiffs' Exhibit 1; R. 35) and certainly not for the assignments which were inadvertently made and subsequently reassigned, nor does the record support in any way the suggestion by appellant that there was any consideration for the reassignment by the company to Mr. Carruthers. A partial explanation of the transaction is found on pages 42 and 43 of the record, and a more complete explanation is found on pages 37 and 38 of the transcript of proceedings in the District Court, which the appellant did not see fit to include in its designation of the record on appeal even though it must have then intended to raise this point for the first time.

The agreements or assignments which may have been made prior to the execution of Plaintiffs' Exhibits 4 and 5

in May, 1950, are wholly immaterial. The full record discloses that until that date there had never been any complete understanding between appellee and the E. H. Carruthers Company. No consideration had ever been paid or determined for the rights to the use of the patents involved, and the sole and primary purpose of the meeting of the stockholders (Plaintiffs' Exhibit 2; R. 41) and of the agreement of May 27, 1950 (Plaintiffs' Exhibit 4; R. 53) was to definitely settle and determine the rights of these parties to the property involved. This is the one and only transaction between these parties in which present and future rights were transferred and for which consideration was paid and received, and is the only transaction before this Court.

The reason for the transfer of patent rights by license rather than by outright assignment is clear. The Court will observe that in substantially all of the cases cited and involving similar questions the transfer is in the form of a license rather than an outright assignment. Inventors grant such an exclusive license and retain the bare legal title in order to have the right to cancel the license agreement upon non-performance or upon the failure by the exclusive license holder to fully exploit the invention. This is the best security that the patent holder has. If he has assigned the full legal and equitable title to the processing or manufacturing company and such company fails to exploit the patent or to otherwise perform the agreement, the patent holder is then

left to a suit for damages which would be an unsatisfactory and unworkable remedy. His right to cancel such an exclusive license agreement for non-performance, however, is a simple and readily available remedy and permits him to make sure that his patent is fully exploited without requiring the long delay that litigation might entail.

Appellant says, on page 11 of its brief, that "The taxpayer, himself, testified before the lower court that he thought his patents could be applied to another industry". To the contrary, the testimony (R. 31-35) and the patent applications (R. 65-80) show that, while there was a remote possibility that the inventions might have been used other than for the packing of tuna, that possibility had no substantial value. No attempt has ever been made to use them for any other purpose (R. 33). The fact that the claims in the patent applications went beyond the tuna canning industry is unimportant. It is the commonly accepted and recommended practice to make such claims as broad as possible. (R. 34) *Walker on Patents, Deller's Edition, Vol. II, pages 770-771.*

The final argument of appellant, which appears on page 11 of its brief, is that any assignment of a patent for a consideration which is measured by the profits which the assignee receives from it is a mere license. The Supreme Court answered this argument as early as the year 1888, in the case of *Rude v. Westcott,* 130 U. S. 152, at 162-3, when it said:

"The concluding provision, that the net profits arising from sales, royalties, or settlements, or other source, are to be divided between the parties to the assignment so as to give the patentee one fourth thereof, does not, in any respect, modify or limit the absolute transfer of title. It is a provision by which the consideration for the transfer is to be paid to the grantor out of the net profits made; it reserves to him no control over the patents or their use or disposal, or any power to interfere with the management of the business growing out of their ownership."

The Commissioner of Internal Revenue advanced this same argument for many years until the 1946 decision of the Tax Court in *Edward C. Myers v. Commissioner,* supra, which held that profit, no matter how determined, realized upon the grant of an exclusive license to make, use and sell an invention or a patent, constituted a capital gain rather than ordinary income. The Commissioner acquiesced in that decision (*Cumulative Bulletin 1946–1, 3*), but about four years later, and on March 20, 1950 (about the time Congress was rejecting his application for a change in the law), the Commissioner reversed himself again and withdrew his acquiesence in the *Myers* decision. He then took the position that royalties received during taxable years beginning after June 1, 1950 from exclusive license agreements, constituted ordinary income (*Mimeograph 6490; Cumulative Bulletin 1950–1, 9*). Of course, we have involved here a taxable year beginning prior to June 1, 1950,

but appellees do not rely upon this fact. Appellees believe that the Commissioner was right in his initial acceptance of the *Myers* case and was wrong when he changed his mind. The Courts of Appeal and the Tax Court have consistently agreed with the appellees' position and disagreed with the Commissioner. His stubborn refusal to follow the courts on this question accounts for much of the litigation in this field.

CONCLUSION

The trial court, in its findings of fact, (R. 19) found that the license agreement constituted an absolute assignment and sale of all of the inventions, applications for patent and patents described therein, and that the amount of $17,016.75 received by Eben H. Carruthers in the year 1950 as "royalties" was in consideration for such assignment and sale. In view of the foregoing, we submit that these findings of fact by the trial court were not "clearly erroneous", within the purview of *Rule 52(a) of the Federal Rules of Civil Procedure,* and that the judgment of the trial court is correct and should be affirmed.

Respectfully submitted,

GORDON SLOAN,
CARL E. DAVIDSON,
CHARLES P. DUFFY,
Attorneys for Appellees.

No. 13932

United States
COURT OF APPEALS
for the Ninth Circuit

UNITED STATES OF AMERICA,
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v.

EBEN H. CARRUTHERS and NANCY CARRUTHERS,
Appellees.

On Appeal from the United States District Court for the District of Oregon

HON. CLAUDE MCCOLLOCH, District Judge

BRIEF FOR THE UNITED STATES

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 11-23-53—40

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No. 13932

United States
COURT OF APPEALS
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UNITED STATES OF AMERICA,
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HON. CLAUDE MCCOLLOCH, District Judge

BRIEF FOR THE UNITED STATES

OPINION BELOW

The findings of fact and conclusions of law of the District Court (R. 16-20) are not officially reported.

JURISDICTION

This appeal involves income tax for the taxable year 1950. The taxes in dispute were paid on February 9, 1951. (R. 18.) The taxpayers filed a timely claim for re-

fund of $3,635.92 with the Collector of Internal Revenue for the District of Oregon on October 2, 1951 (R. 4, 18); upon a failure to receive a statutory notice of disallowance of this refund claim and after the expiration of six months taxpayers filed their complaint with the District Court on June 2, 1952 (R. 18-19, 27). On November 21, 1952, the case was tried before the District Court (R. 27), after which judgment was entered on March 3, 1953 for the taxpayers in the amount of $3,635.92 plus interest (R. 21-22). The District Court had jurisdiction of this suit under 28 U.S.C., Section 1346. Notice of appeal was filed on May 1, 1953 (R. 22-23), and the time for filing the record on appeal and docketing the action in the United States Court of Appeals for the Ninth Circuit was extended by order of the District Court 90 days from April 30, 1953 on June 2, 1953 (R. 23). Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether the payments received by the taxpayer in the taxable year 1950 from the E. H. Curruthers Company for certain patent rights constituted proceeds from a sale so as to be taxable under Section 117 (b) of the Internal Revenue Code as a capital gain, or proceeds from a licensing agreement taxable as ordinary income.

STATUTE INVOLVED

The applicable provisions of the statute will be found in the Appendix, *infra*.

STATEMENT

The facts were found by the District Court as follows (R. 16-19):

Taxpayers instituted this action to recover individual income taxes collected from them by a former Collector of Internal Revenue of the United States for the District of Oregon, for the calendar year 1950. (R. 16.)

Taxpayers, husband and wife, are and at all times material herein were residents and inhabitants of Clatsop County, Oregon. During the period from September 1, 1947, to November 1, 1952, Hugh H. Earle was the Collector of Internal Revenue for the District of Oregon. (R. 17.)

On May 27, 1950, taxpayer Eben H. Carruthers entered into a contract with the E. H. Carruthers Company, an Oregon corporation (Ex. 4), and on May 31, 1950, taxpayer Eben H. Carruthers entered into a "license agreement" with the same corporation (Ex. 5), under the terms of which he granted to the company "an exclusive license to manufacture, use, sell or lease machinery or to practice any method in accordance with or as set forth in certain United States and foreign patents and applications for patents, together with the right to sub-license others", as more fully stated in the agreement. The exclusive license was "limited to the tuna canning industry", but extended "to the end of the term of any patent listed or to the end of the term of any patent which may issue upon a patent application listed." (R. 17.)

The inventions of the taxpayer, Eben H. Carruthers, which were the subject of the aforementioned agreements, had been reduced to practice more than six months' prior to May 27, 1950. (R. 18).

On February 9, 1951, taxpayers filed a joint income tax return for the year 1950, reporting a total net income of $36,927.44 and a tax liability of $10,581.98, which was duly paid. In this return the taxpayers included as ordinary gross income the total amount of $38,976.75, received from the E. H. Carruthers Company in accordance with paragraphs 2, 3, and 4, of the contract of May 27, 1950. (R. 18.)

On October 2, 1951, the taxpayers filed an amended joint income tax return showing a net income of $28,-419.02 and a timely claim for refund on Form 843 for $3,635.92, upon the ground that the amount of $17,-016.75 received by the taxpayer Eben H. Carruthers in the year 1950, as provided in paragraph 4 of the contract of May 27, 1950 (Ex. 4), represented profit to him on the sale of patent rights as a long-term capital gain rather than ordinary income to him. (R. 18.)

Taxpayers did not receive a statutory notice of the disallowance of their refund claim, as provided in Section 3772 (a)(2) of the Internal Revenue Code, but more than six months expired between the filing of the refund claim and the commencement of this action. (R. 18-19.)

The license agreement dated May 31, 1950 (Ex. 5), constituted an absolute assignment and sale of all of the inventions, applications for patent and patents described therein. The amount of $17,016.75 received by the tax-

payer Eben H. Carruthers in the year 1950 as "royalties" was in consideration of such assignment and sale. (R. 19.)

The inventions, applications for patent and patents described in the aforementioned agreement did not constitute property held by the taxpayer Eben H. Carruthers primarily for sale to customers in the ordinary course of trade or business. (R. 19.)

STATEMENT OF POINTS TO BE URGED

A statement of points upon which the Government relies is set forth in the record. (R. 24-25.) It may be summarized as follows:

The court erred in finding and concluding that the license agreement, dated May 31, 1950, constituted an absolute assignment and sale of all the inventions, patents, and applications for patents described therein; and in concluding that the amounts received by the tax payer* in 1950 were reportable as a long term capital gain and therefore taxpayers were entitled to recover judgment.

SUMMARY OF ARGUMENT

The District Court's conclusion that the taxpayer's contract of May 27, 1950, constituted a "sale of said inventions, applications for patent and patents" listed in the license agreement of May 31, 1950, depends for

*Eben H. Carruthers will hereinafter be referred to as the taxpayer.

its validity upon the legal determination of what constitutes a sale as differentiated from a lease of a patent. Whether a transfer of an interest or a right under a patent is a sale or only a license does not depend upon the terminology used by the parties. However, to constitute a sale, the conveying instrument must be unambiguous and show a clear and unmistakable intent to part with the patent.

It should be noted at this point that this is not the first, and perhaps not the last, license of these patents between the same parties. In fact some of the patents which had been previously assigned by the taxpayer to the E. H. Carruthers Company were reassigned to him with the understanding that he would grant the company a license to manufacture, use, sell or lease machinery in accordance with the license only within the tuna industry.

Taxpayer's subsequent license agreement and contract with the company have various features indicative of a license as distinguished from a sale and complete transfer of title.

A. The language of the license agreement entered into by the parties was insufficient to transfer the entire right, title and interest in the patents to the company. That fact is borne out by the language of the agreement and the lower court's finding that the license was limited to the tuna canning industry. Here, therefore, the Company only acquired the right to use the patents in one industry. However, the company realizing, as admitted by taxpayer, that the patents involved here could be

used in other industries procured a first option to purchase a license to manufacture, use, sell or lease any machine, device or apparatus the taxpayer might perfect under these patents which might be useful outside the tuna industry. We therefore submit that taxpayer's failure to part with the whole bundle of rights is fatal to and incompatible with the idea of a sale. Therefore the relationship drawn up here was that of a licensor and licensee and accordingly the payments received were taxable as ordinary income rather than as capital gain.

B. Under taxpayer's agreement with the company the latter was obligated to pay him eight percent of its gross receipts from use of the machines on which he controlled the patents. Thus it is apparent that the taxpayer retained the right to receive royalties from the profitable exploitation of his patents and that any amounts received by him pursuant to the contract constituted royalties from the lease of the patents taxable as ordinary income.

Therefore, contrary to the lower court's finding and conclusion, taxpayer's agreement and contract with the company constituted a lease not a sale of the patents and the amounts received thereunder were reportable as ordinary income and taxpayers were not entitled to a refund.

ARGUMENT

Taxpayer's Agreement with the E. H. Carruthers Company Constituted a License, Not a Sale

The District Court's conclusion (R. 19-20) that the taxpayer's contract of May 27, 1950 (R. 53-57), with the E. H. Carruthers Company constituted an absolute "assignment" and "sale" of his inventions, applications for patent and patents listed in the license agreement of May 31, 1950 (R. 57-61), to the aforementioned company necessarily depends for its validity upon the conformity of the contract with the legal concept of what constitutes a sale of a patent. The distinction between an asignment of a patent (which for a consideration would be a sale) and a license was stated long ago in *Waterman v. Mackenzie,* 138 U.S. 252, which is the "leading case" on the subject, and was reiterated in *United States v. Gen. Elec. Co.,* 272 U.S. 476, and in this Court's opinion in *Six Wheel Corp. v. Sterling Motor Truck Co.,* 50 F. 2d 568, 571-572. Quoting from *Waterman v. Mackenzie,* (p. 255), the distinction is as follows:

> The patentee or his assigns may, by instrument in writing, assign, grant and convey, either, 1st. the whole patent, comprising the exclusive right to make, use and vend the invention throughout the United States; or, 2d, an undivided part or share of that exclusive right; or, 3d, the exclusive right under the patent within and throughout a specified part of the United States. * * * A transfer of either of these three kinds of interests is an assignment, properly speaking, and vests in the assignee a title in so much of the patent itself, * * *. Any assignment or transfer, short of one of these, is a mere license, giving

> the licensee no title in the patent, and no right to sue at law in his own name for in infringement. * * * In equity, as at law, when the transfer amounts to a license only, the title remains in the owner of the patent; * * *.

The distinction thus drawn has been repeatedly applied in tax cases. *Gregg v. Commissioner,* 18 T.C. 291, affirmed *per curium,* 203 F. 2d 954 (C.A. 3d); *Broderick v. Neale,* 201 F. 2d 621 (C.A. 10th); *Bloch v. United States,* 200 F. 2d 63 (C.A. 2d); *Allen v. Werner,* 190 F. 2d 840 (C.A. 5th); *Kavanagh v. Evans,* 188 F. 2d 234 (C.A. 6th); *Hook v. Hook & Ackerman,* 187 F. 2d 52 (C.A. 3d); *Commissioner v. Celanese Corp.,* 140 F. 2d 339 (C.A.D.C.); *General Aniline & Film Corp. v. Commissioner,* 139 F. 2d 759 (C.A. 2d), and *Kronner v. United States,* 110 F. Supp. 730 (C.Cls.). Whether the transfer of an interest or right under a patent is a sale or only a license does not depend upon the terminology used by the parties (*Waterman v. Mackenzie, supra,* p. 556), here that of a "license" (R. 57), but to constitute a sale "the instrument of transfer must be unambigous and show a clear and unmistakable intent to part with the patent." *Kenyon v. Automatic Instrument Co.,* 160 F. 2d 878, 882 (C.A. 6th).

That the instrument involved here was intended as a license and not an assignment is clearly demonstrated by the prior transactions between the taxpayer and the company in relation to the patents. Taxpayer first assigned some of the patents involved to the company. At a special meeting of the stockholders of the latter it was decided to reassign the aforementioned patents to the taxpayer *with the understanding that he would retain*

full title to any present and all future inventions and patents but would grant the company a license to manufacture, use, sell or lease machinery in accordance with the agreement solely for the tuna industry. The directors also decided to pay taxpayer eight percent of the gross receipts received by the company from the limited use of his patents. (R. 41-51.) It was pursuant to the foregoing that the instruments involved here were executed.

Taxpayer's subsequent "license agreement" and contract with the company also have various features indicative of a license, as distinguished from a sale and complete transfer of title. These matters will be considered separately below.

A. *The language of the agreement.*

The language of the license agreement of May 31, 1950, is insufficient as a transfer of the entire right, title and interest in the patents to the company. Section 2 of the agreement merely states that (R. 60):

> *The exclusive license set forth above is limited to the tuna canning industry* but shall extend to the end of the term of any patent listed or to the end of the term of any patent which may issue upon a patent application * * *. (Italics supplied.)

And the trial court found that (R. 17):

> The exclusive license was "limited to the tuna canning industry", * * *.

Here, therefore, when the taxpayer split off the above mentioned right, the company did not become the owner of the patents, patent rights, etc., themselves but ac-

quired only what limited and lesser rights were specifically granted by the terms of the agreement. In fact, the taxpayer himself testified before the lower court that he thought his patents could be applied to another industry. (R. 33-35.) It was for that very reason that the board of directors of the company directed their company to enter into a contract with the taxpayer for the first option to purchase a license to manufacture, use, sell or lease any machine, device or apparatus of his which would be useful outside the tuna industry (R. 48-50); this direction was carried out (R. 53, 61).

B. *The Payments received by the taxpayer under the Contract.*

Pursuant to the taxpayer's agreement of May 27, 1950, with the company, the latter was obligated to pay (R.55)—

> to Carruthers an amount equal to eight per cent (8%) of the gross receipts of E. H. Carruthers Company *resulting from any machines upon which Carruthers controls the patents.* * * * (Italics supplied.)

Thus, we are once again confronted with taxpayer's retention of an instrinsic right, conferred on him by the patenting of the machinery, i.e., the right to profitably exploit the patented articles by receiving a percentage of the gross receipts from their sale or rental. We submit that the amounts paid under the above mentioned provision of the contract constituted royalties from the lease of the taxpayer's patents applicable to the tuna canning industry rather than the proceeds from a sale taxtble as a captial gain.

Accordingly, it is apparent, contrary to the District Court's conclusion, that due to the taxpayer's retention of rights under the patents, his agreement and contract with the company, constituted a lease, not a sale, and the proceeds were properly reported as ordinary income rather than as capital gain.

CONCLUSION

The decision of the District Court is wrong and should therefore be reversed by this Court.

Respectfully submitted,

H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
A. F. PRESCOTT,
JOHN J. KELLEY, JR.,
Special Assistants to the Attorney General.

HENRY L. HESS,
United States Attorney.
VICTOR E. HARR,
Assistant United States Attorney.

DECEMBER, 1953.

APPENDIX

INTERNAL REVENUE CODE:

SEC. 22 [as amended by Sec. 1 of the Public Salary Tax Act of 1939, c. 59, 53 Stat. 574]. GROSS INCOME.

(a) *General Definition.* — "Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * *

(26 U.S.C. 1946 ed., Sec. 22.)

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions.*—As used in this chapter—

(1) *Capital Assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used

in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (1), * * *;

* * * *

(4) [as amended by Sec. 150 (a) (1) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Long-Term Capital Gain.*—The term "long-term capital gain" means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing net income;

* * * *

(b) [As amended by Sec. 150 (c) of the Revenue Act of 1942, *supra*] *Percentage Taken Into Account.*— In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net capital gain, net capital loss, and net income:

100 per centum if the capital asset has been held for not more than 6 months;

50 per centum if the capital asset has been held for more than 6 months.

* * * *

(26 U.S.C. 1946 ed., Sec. 117.)

No. 13934

United States
Court of Appeals
for the Ninth Circuit

DON MAURICE RANDALL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeal from the District Court
for the Territory of Alaska,
Third Division**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11/13/53

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

SEABORN J. BUCKALEW,
United States Attorney,

LYNN W. KIRKLAND,
Assistant United States Attorney,

Attorneys for Plaintiff.

McCUTCHEON, NESBETT & RADER,
P. O. Box 2257,
Anchorage, Alaska,

Attorneys for Defendant.

In the District Court for the Territory of Alaska, Third Division

Criminal No. 2779

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DON MAURICE RANDELL,

Defendant.

INDICTMENT

(Section 65-4-22, ACLA, 1949)

The Grand Jury charges:

That on or about the 16th day of July, 1952, at a place known as Keith & Clara's, on the Seward Highway, near Anchorage, Third Judicial Division, Territory of Alaska, the said Don Maurice Randall, being then and there armed with a dangerous weapon, to wit, a revolver, did then and there assault one Paul Abernathy by pointing said gun at the said Paul Abernathy and threatening to do him bodily harm if a drink of intoxicating liquor was not served to the said Paul Abernathy and his companion.

A True Bill:

/s/ JERRY HOLA,
Foreman.

/s/ LYNN W. KIRKLAND,
Asst. United States Attorney.

Witnesses examined before the grand jury:

Patricia Herrick,

Paul Abernathy.

[Endorsed]: Filed November 19, 1952.

Walter Scott Brown, M.D.
William E. Lacy, Jr., M.D.
505 Ninth Avenue
Seattle 4

February 2, 1953.

Stanley McCutcheon,
Attorney at Law,
Anchorage, Alaska.

Dear Mr. McCutcheon:

Don Randall was severely injured on January 23, 1953, as a result of an automobile accident.

He has multiple, severe facial lacerations and a back injury which complicates his condition, and it is felt that it will be at least four weeks before he will be able to return to Alaska.

Respectfully yours,

/s/ W. S. BROWN,
W. S. BROWN, M.D.

WSB:bjm

[Endorsed]: Filed February 5, 1953.

[Title of District Court and Cause.]

MOTION

Comes now counsel for the defendant in the above-captioned criminal action and respectfully moves the Court for an indefinite continuance of the time of trial of said action.

This motion is based on the affidavit of Walter Scott Brown, M.D.

Dated at Anchorage, Alaska, this 24th day of February, 1953.

McCUTCHEON, NESBETT & RADER,

/s/ STANLEY J. McCUTCHEON,
Attorneys for Defendant.

Walter Scott Brown, M.D.
505 Ninth Avenue
Seattle 4

February 17, 1953

Stanley McCutcheon,
Attorney at Law,
Anchorage, Alaska.

Dear Mr. McCutcheon:

Don Randall, as you know, was injured severely in an automobile accident on January 23, 1953, and is still suffering from the effects of the lacerations of his face, ear and in addition post brain concussion with severe headaches and occasional fainting spells.

He has an appointment on February 17th with a neurologist to verify just how severe this post concussion complex is. It is my impression that in view of the symptoms he has suffered a great deal more brain damage than is evident.

He returned to Alaska against my advice and without apparent reason inasmuch as he was fully aware of the seriousness of his condition and in addition to his lack of mental acumen he has now developed a tendency toward forgetfulness.

From my observation of this patient, I am sure he is in no mental state to carry on business affairs to any degree of safety and I am sure the neurologist examination will reveal the extent of his ceberal damage.

Very sincerely yours,

/s/ W. S. BROWN,
W. S. BROWN, M.D.

WSB:bjm

Subscribed and sworn to before me this 19th day of February, 1953.

[Seal]: /s/ WM. L. THULL,
Notary Public in and for the State of Washington, residing at Seattle.

Service of copy acknowledged.

[Endorsed]: Filed February 24, 1953.

[Title of District Court and Cause.]

HEARING ON MOTION FOR INDEFINITE CONTINUANCE

Now, at this time, hearing on motion for indefinite continuance in cause No. 2779 Cr., entitled United States of America, plaintiff, versus Don Maurice Randell, defendant, came on regularly before the Court, Seaborn J. Buckalew, United States Attorney present for and in behalf of the Government, Stanley J. McCutcheon, of counsel for defendant, the following proceedings were had to wit:

Argument to the Court was had by Stanley J. McCutcheon, for and in behalf of the defendant.

Whereupon, Court denied motion on ground affidavit is insufficient.

Entered Feb. 27, 1953.

[Title of District Court and Cause.]

MOTION

Comes now counsel for the defendant in the above-captioned criminal action and respectfully moves the Court for a continuance of fifteen days from date hereof of the time of trial of said action.

This motion is based on the statement of Richard O. Sellers, M.D., attached hereto.

Dated at Anchorage, Alaska, this 4th day of March, 1953.

McCUTCHEON, NESBETT & RADER,

/s/ STANLEY McCUTCHEON,
Attorneys for Defendant.

Richard O. Sellers, M.D.
P. O. Box 110
Seward, Alaska

March 3, 1953.

To Whom it may concern:

Don Randall, who has been previously under my care for the past year was seen by me on March 2, 1953, complaining of marked nervousness, anxiety and apprehension. Upon examination, I found his distress considerably more pronounced than upon any previous visit. History reveals an injury to his head sustained in a car accident on January 29, 1953, while driving near Spokane, Washington.

I feel that his condition at present requires considerable rest and that he should refrain from any excitement, stress or strain which could increase his disability necessitating much care and hospitalization.

/s/ R. O. SELLERS, M.D.,
R. O. SELLERS, M.D.

[Endorsed]: Filed March 4, 1953.

[Title of District Court and Cause.]

AFFIDAVIT OF STANLEY McCUTCHEON

United States of America,
Territory of Alaska—ss.

Comes now Stanley McCutcheon, attorney for the above defendant, and being first duly sworn, on oath, deposes and says:

That on the 23rd of January, 1953, at Seattle, Washington, defendant was seriously injured while riding as a passenger in an automobile;

That he was taken to the Walter Scott Brown Clinic at 505 Ninth Avenue, Seattle Washington, for treatment. That Dr. Brown advised affiant that the defendant suffered multiple lacerations and deep cuts of the face and ear necessitating the taking of over one hundred sutures;

That in addition to serious cuts and bruises, affiant is informed by Dr. Brown that defendant is suffering a serious post brain concussion resulting in headaches and fainting spells.

Affiant further states that defendant has been advised by his doctor not to engage in any business activities nor to undergo any activity whatsoever that will bring on a feeling of stress or excitement. That defendant's doctors have warned that to do so may seriously and permanently impair his health.

Affiant is advised by defendant's doctors that defendant evidences, as a result of his injuries, lack of mental acumen and has developed a tendency toward loss of memory.

Affiant says further that he counseled defendant in connection with the above criminal action prior to defendant's injuries and defendant was clear in memory of certain facts important to his defense. That affiant has recently counseled defendant with reference to facts of his case and finds that the defendant is unable to remember matters that were heretofore clearly remembered by defendant all important to his defense.

Affiant further states on information of defendant's doctors that rest and quiet will improve defendant's general health and that his normal memory will likely be restored.

Affiant states further that to try the defendant on the 5th of March, 1953, will be unfair to the defendant because of his ill health.

/s/ STANLEY McCUTCHEON.

Subscribed and Sworn to before me this 4th day of March, 1953.

[Seal] /s/ HATTIE W. VERMILYEN,
Notary Public in and for
Alaska.

My commission expires 3-9-55.

[Endorsed]: Filed March 4, 1953.

[Title of District Court and Cause.]

HEARING ON MOTION FOR CONTINUANCE

Now at this time hearing on motion for continuance in Cause No. 2779 Cr., entitled United States of America, plaintiff, versus Don Maurice Randall, defendant, came on regularly before the Court, Seaborn J. Buckalew, United States Attorney, present for and in behalf of the Government, defendant not present, but represented by Stanley J. McCutcheon, of his counsel, the following proceedings were had, to wit:

Argument to the Court was had by Stanley J. McCutcheon, for and in behalf of the defendant.

Now at this time Court continued cause to 1:45 o'clock p.m. this date.

Entered March 4, 1953.

[Title of District Court and Cause.]

HEARING ON MOTION FOR CONTINUANCE (Continued)

Now at this time came the respective counsel as heretofore and the hearing on motion for continuance in Cause No. 2779 Cr., entitled United States of America, plaintiff, versus Don Maurice Randell, defendant, was resumed.

Argument to the Court was had by Stanley J. McCutcheon, for and in behalf of the defendant.

Motion denied for insufficiency of affidavit.

Entered March 4, 1953.

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED INSTRUCTION TO JURY No. 1

An unloaded gun is not a dangerous weapon when used only as a firearm. The pointing of an unloaded gun at the prosecuting witness, accompanied by a threat, without any attempt to use it otherwise, is not an assault with a dangerous weapon, and cannot sustain a conviction for such an assault for want of

present ability to commit a violent injury on the person threatened in the manner attempted, and this, too, regardless of whether the party holding the gun thought it was loaded, or whether the party at whom it was menacingly pointed was thereby placed in great fear.

74 ALR 1206

Price v. U. S., 156 F. 950

People v. Bennett, 173 P. 1004

People v. Sylva, 76 P. 814

[Endorsed]: Filed March 5, 1953.

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED INSTRUCTION TO JURY No. 2

You are instructed but whether the person at whom the gun was pointed believed it to be loaded is not to be considered in determining the guilt or innocence of the defendant.

[Endorsed]: Filed March 5, 1953.

[Title of District Court and Cause.]

COURT'S INSTRUCTIONS TO THE JURY

No. 1

The indictment in this case charges the defendant with the crime of assault with a dangerous weapon, alleged to have been committed on or about July 16,

1952, near Anchorage, upon Paul Abernathy, by pointing a gun at him and threatening him with bodily harm.

The law of Alaska defines the crime charged as follows:

> "That whoever being armed with a dangerous weapon shall assault another with such weapon, shall be punished."

An assault with a dangerous weapon is an unlawful offer, coupled with present ability, to injure another with such weapon. Any pointing of a loaded gun at or toward another in a menacing and threatening manner is sufficient to constitute an assault with a dangerous weapon.

In this connection, you are instructed that a loaded revolver is a dangerous weapon. Whether it was loaded at the time charged may be inferred from the surrounding facts and circumstances, but whether the facts and circumstances proved are such as to warrant such an inference, is for you to say.

No. 2

The essential elements of the crime charged, each of which must be proved beyond a reasonable doubt before the defendant may be convicted, are:

(1) An assault, and

(2) With a dangerous weapon

It is undisputed that the crime, if committed, was committed at or about the time and place charged. Therefore, if you find from the evidence beyond a reasonable doubt that at or about the time and place

charged, the defendant made an assault with a loaded revolver upon Paul Abernathy by pointing it at or toward the said Abernathy in a threatening or menacing manner, you should find him guilty. But if you do not so find or have a reasonable doubt thereof, you should acquit him.

No. 3

Included in the crime charged in the indictment is the crime of simple assault.

Simple assault is defined as:

> "Whoever, not being armed with a dangerous weapon, unlawfully assaults or threatens another in a menacing manner, shall be punished."

Therefore, if you find that the revolver was not loaded but do find from the evidence beyond a reasonable doubt that the defendant unlawfully or in a threatening or menacing manner, pointed said revolver at or toward the said Abernathy and that the said Abernathy did not know that it was not loaded and was thereby put in fear and apprehension of injury, you should find the defendant guilty. But if you do not so find or have a reasonable doubt thereof, you should acquit him.

You are also instructed that if you find that an assault was committed but are in doubt whether it was an assault with a dangerous weapon or merely simple assault, you should convict the defendant of the lower grade of offense, that of simple assault.

No. 4

The law presumes every person charged with crime to be innocent and, hence, the defendant is

entitled to the benefit of this presumption until it has been overcome by evidence beyond a reasonable doubt. This rule as to the presumption of innocence is a humane provision of the law intended to guard against the conviction of innocent persons, but it is not intended to prevent the conviction of any person who is in fact guilty or to aid the guilty to escape punishment.

No. 5

The burden of proving the offense charged beyond a reasonable doubt is on the prosecution. Whether this burden of proof is sustained is to be determined by you from all the evidence in the case, and not merely from the evidence introduced on behalf of the prosecution.

No. 6

A reasonable doubt is not just any vague, fanciful or imaginary doubt, but one that arises after a careful consideration of all the evidence or from a lack thereof. It is a doubt based on reason, and not on a bare possibility of innocence, or on sympathy or a desire to escape from an unpleasant duty. Everything relating to human affairs and depending on human testimony is open to some possible doubt, and this is true of guilt.

If after carefully analyzing, comparing and weighing all the evidence, you have a settled conviction or belief of defendant's guilt, amounting to a moral certainty, such as you would be willing to act upon in matters of the highest importance relating to your own affairs, then you have no reasonable doubt.

No. 7

Subject to the law as contained in these instructions you are the exclusive judges of the credibility of the witnesses and of the effect and value of the evidence. Evidence includes not only all the facts testified to or established by the exhibits, but also all reasonable inferences which may be deduced therefrom. What facts have been proved and what inferences may be deduced therefrom is for you to determine. The term "witnesses" as used in this instruction includes the defendant.

You are, however, instructed that your power of judging the effect of evidence is not arbitrary but is to be exercised by you with legal discretion and in subordination to the rules of evidence. Evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which it is in the power of one side to produce and of the other to contradict and, therefore, if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party offering it, such evidence should beviewed with distrust.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number or against a presumption or other evidence satisfying your minds. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice or from a desire to favor

one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on opposing sides, and that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence. The direct evidence of one witness whom you find to be entitled to full credit is sufficient for the proof of any fact in this case.

In determining the credibility of witnesses and the weight to be given their testimony, you should decide what testimony is to be believed in the same way as you would decide whether to believe something told you out of court. You size up the witness in court in the same way as an informant out of court, observe his appearance and demeanor, note his intelligence, whether he is candid and fair or evasive, whether he has an interest in the outcome of the trial, what motive he may have for testifying as he did, the opportunity he had to observe or learn or remember the facts to which he testified, the probability or improbability of his testimony, his bias or prejudice against or inclination to favor either party, his character as shown by the evidence, the extent to which he is corroborated or contradicted and all the other facts and circumstances which shed light on his credibility and the weight of his testimony.

A witness may be impeached by evidence affecting his character for truth, honesty, or integrity, or by contradictory evidence. A witness may also be impeached by evidence that at other times he has made

statements inconsistent with his present testimony as to any matter material to this case; or by proof that he has been convicted of a crime. However, the impeachment of a witness does not necessarily mean that his testimony is completely deprived of value or that its value is destroyed in any degree. The effect, if any, of the impeachment upon the credibility of the witness is for you to determine. A witness wilfully false in one part of his testimony may be distrusted in other parts. Discrepancies in a witness' testimony or between his testimony and that of other witnesses, if any, do not necessarily mean that the witness should be discredited. Failure of or a mistaken recollection is a common experience. It is a fact, also that two persons witnessing an incident or a transaction rarely agree on the details especially with regard to time, distance, etc. You should not, therefore, be misled by discrepancies in unimportant matters or in testimony which is immaterial to the question of guilt or innocence. But a wilful falsehood always is a matter of importance and should be seriously considered. Whenever it is possible you will reconcile conflicting or inconsistent testimony, but where it is not possible to do so, you should apply the tests stated and give credence to that testimony which, under all the facts and circumstances of the case, appeals to you as the most worthy of belief.

You are not bound to believe something to be a fact merely because a witness has stated it to be a fact, but you are to determine the fact by applying the tests stated in this instruction. And where wit-

nesses directly contradict each other on any material matter, and are the only ones who have testified thereto, you are not to consider the evidence evenly balanced or such matter not proved but you should ask yourselves what motive the one had for testifying as he did, and what motive the other had for testifying to the opposite, and after applying the tests referred to and considering all the evidence, determine whom to believe.

Finally, you may, in determining any question, resort to the sound common sense and experience which you use in the ordinary affairs of life. Also, in addition to drawing inferences and conclusions from the evidence you may consider such matters of common knowledge as are not disputable.

No. 8

You are also instructed that the opening statements and the arguments of counsel are not evidence, and they are not binding upon you. You may, however, be guided by them if you find that they are based on the admitted evidence and appeal to your reason and judgment, and are not in conflict with the law as set forth in these instructions.

No. 9

I also instruct you that you should not concern yourselves with the matter of punishment. That is the exclusive concern of the Court. You are not responsible for the consequences of your verdict but only for its truth so far as the truth is determinable by you. When you have arrived at a verdict in accordance with these instructions, you need not sub-

mit to any questioning as to how you reached your verdict or what occurred in the jury room except in a proper proceeding in this court.

No. 10

Jurors are impaneled for the purpose of agreeing upon a verdict, if they can conscientiously do so, so that there may be an end to litigation. In each case the verdict must be unanimous. But while the verdict should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference and discussion in the jury room. It is not intended that a juror should go to the jury room with a fixed determination that the verdict shall represent his opinion of the case at that moment. Nor is it intended that he should close his ears to the arguments of other jurors. The very object of the jury system is to secure unaniminity by a comparison of the views of, and by discussion and argument among, the jurors, themselves. Hence, while no juror should yield a sincere conviction founded upon the evidence and the law as laid down in these instructions merely to agree with the jury, every juror, in considering the case with fellow jurors, should lay aside all undue pride and vanity of personal opinion and listen, with a disposition to be convinced, to the opinions and arguments of the others and a desire to get at the truth in order that a just verdict, representing the judgment of the entire jury, may be reached.

Accordingly, no juror should hesitate to change the opinion he has entertained or expressed, if hon-

estly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors. But before a verdict of guilty can be rendered, each of you must be able to say, in answer to your individual conscience, that you have arrived at a settled conviction, based upon the law and the evidence of the case and nothing else, that the defendant is guilty.

No. 11

You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and, therefore, you should not single out one particular instruction and consider it by itself.

Your duty is to determine the facts of the case from the evidence submitted, and to apply to these facts the law as given to you by the Court in these instructions. The Court does not, either in these instructions or otherwise, wish to indicate how you shall find the facts or what your verdict shall be or to influence you in the exercise of your right and duty to determine for yourselves the effect of evidence you have heard or the credibility of witnesses.

No. 12

Upon retiring to your jury room you will select one of your number foreman, who will preside over your deliberations and be your spokesman in court.

You will take with you to the jury these instructions, the exhibits, together with three forms of verdict, which are self-explanatory.

I you unanimously agree upon a verdict during

business hours, that is between 9 a.m. and 5 p.m., you should have your foreman fill in, date and sign it and then return with your verdict immediately into open court, together with these instructions and the unused forms of verdict. If, however, you do not agree upon a verdict until after 5 p.m. one day and before 9 a.m. the following day, the verdict, after being similarly filled in, dated and signed, must be sealed in the envelope accompanying these instructions. The foreman will then keep it in his possession unopened and the jury may separate and go to their homes, but all of you must be in the jury box when the Court next convenes at 10 a.m. when the verdict will be received from you in the usual way.

If it becomes necessary during your deliberations to communicate with the Court, you may do so by having the bailiff deliver a written message to the Court, but you must not in such message or otherwise reveal to the Court or any person how the jury stands on the question of guilt or innocence.

Given at Anchorage, Alaska, this 5th day of March, 1953.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed March 6, 1953.

[Title of District Court and Cause.]

VERDICT No. 1

We, the jury, find the defendant guilty of assault with a dangerous weapon as charged in the indictment.

Dated at Anchorage, Alaska, this 5th day of March, 1953.

/s/ ANTHONY SCHNABEL, JR.,
Foreman.

[Endorsed]: Filed March 6, 1953.

Entered March 6, 1953.

In the District Court for the Territory of Alaska, Third Division

Criminal No. 2779

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DON MAURICE RANDALL,

Defendant.

JUDGMENT, SENTENCE AND COMMITMENT

On this 13th day of March, 1953, came Seaborn J. Buckalew, United States Attorney, the attorney for the Government, and the defendant, Don Maurice Randall, appeared in person and by his counsel, Stanley J. McCutcheon, Esquire.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of assault with a dangerous weapon as charged in the Indictment on file herein:

and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant, Don Maurice Randall, is guilty as charged and convicted.

It Is Adjudged that the defendant, Don Maurice Randall, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) and One-half (½) years, said sentence to commence and begin on the 13th day of March, 1953, and that said defendant stand committed until said sentence is served.

It Is Ordered that the Clerk deliver a certified copy of this Judgment, Sentence and Commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Done in open Court at Anchorage, Alaska, this 18th day of March, 1953.

/s/ GEORGE W. FOLTA,
District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 18, 1953.

Entered March 18, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Appellant: Don Maurice Randall, Kenai, Alaska.

Appellant's Attorney: Stanley J. McCutcheon; McCutcheon, Nesbett & Rader, Anchorage, Alaska.

Offense: Assault with a Dangerous Weapon.

Judgment: On the 13th day of March, 1953, the appellant, Don Maurice Randall, was convicted upon his plea of not guilty and a verdict of guilty of the offense of Assault with a Dangerous Weapon as charged in the Indictment filed herein, and was committed for imprisonment for a period of Two (2) and One-half (½) years, said sentence to commence and begin on the 13th day of March, 1953, and the defendant is to stand committed until said sentence is served.

Institution where now confined: Federal Jail at Anchorage, Alaska.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated at Anchorage, Alaska, this 19th day of March, 1953.

/s/ DON M. RANDALL,
Appellant.

[Endorsed]: Filed March 19, 1953.

[Title of District Court and Cause.]

ORDER OF DISTRICT COURT GRANTING EXTENSION OF TIME FOR FILING RECORD

This cause came on for hearing on the motion of the defendant, by and through his attorneys, McCutcheon, Nesbett & Rader, to extend the time for filing the record on appeal to the Court of Appeals for the Ninth Circuit, and good cause appearing for such extension, it is

Ordered that the time for filing the record on appeal and docketing the appeal herein be and the same hereby is extended to and including August 1, 1953.

Dated at Anchorage, Alaska, this 21st day of April, 1953.

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed April 21, 1953.

In the United States District Court for the District of Alaska, Third Division

No. 2779 Cr.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DON MAURICE RANDALL,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Before: The Honorable George W. Folta,
United States District Judge.

March 5, 1953—10:00 A.M.

Appearances:

For the Plaintiff:

SEABORN J. BUCKALEW,
United States Attorney;

LYNN W. KIRKLAND,
Assistant U. S. Attorney,
Third Division, Territory of Alaska,

For the Defendant:

STANLEY J. McCUTCHEON,
Attorney for Defendant.

DON MAURICE RANDALL,
Defendant in Person.

The Court: The parties ready in the case of United States vs. Randall?

Mr. Buckalew: The United States is ready.

Mr. McCutcheon: May we approach the bench and be heard on that? The defendant is not ready for trial for the reasons stated in the Doctor's affidavit, the affidavit of Walter Scott Brown and the affidavit of Dr. Richard Sellers of Seward, and at this time we renew our request for a 15-day continuance.

The Court: The motion is denied. You may proceed to empanel the jury.

Whereupon, the Deputy Clerk proceeded to draw from the trial jury box, one at a time, the names of the members of the regular jury panel of petit

jurors, and counsel for both plaintiff and defendant examined and exercised their challenges against said jurors, until the jury of twelve jurors was complete, and counsel for plaintiff and counsel for defendant stipulated that a verdict of less than twelve jurors may be received in case of illness, disability, or other good cause for excusing one of the jurors, and that it is therefore unnecessary to draw the names of alternate jurors in the cause. Whereupon, said jury was duly sworn to well and truly try the cause and a true verdict render in accordance with the evidence and the [3*] instructions of the Court, and the Court indicated the trial should then proceed.

The Court: According to the record here the defendant has never been arraigned or pleaded; is that correct?

Mr. Buckalew: I have a note on my file that he was arraigned. Perhaps it is an erroneous notation, nothing here in the file to indicate it.

Deputy Clerk: What date?

Mr. Buckalew: That is in the Commissioner's Court.

The Court: The defendant will be arraigned.

Deputy Clerk: Does the defendant waive reading of the indictment?

***Page numbering appearing at foot of page of original Reporter's Transcript of Record.**

(The defendant was thereupon duly arraigned upon the indictment and furnished with a copy thereof.)

Mr. McCutcheon: Yes, ma'am.

The Court: What is your plea—guilty or not guilty?

The Defendant: Not guilty.

The Court: That will be all. You may make your opening statement.

(Opening statement to the jury was made by Seaborn J. Buckalew, United States Attorney, on behalf of the plaintiff.)

(Opening statement to the jury was made by Stanley J. McCutcheon on behalf of the defendant.) [4]

DAVID E. THOMPSON

called as a witness on behalf of the plaintiff and, being first duly sworn, testified as follows:

Direct Examination

By Mr. Buckalew:

Q. Will you state your full name, please?

A. David E. Thompson.

Q. You a resident of Anchorage?

A. South of Anchorage on the Johns Road.

Q. You live out near Keith and Clara's place?

A. About a mile and a half.

Q. Were you in Keith and Clara's establishment on the 16th day of July, 1952? A. I was.

(Testimony of David E. Thompson.)

Q. Do you recall about what time of the day it was?

A. It was around 7:00 o'clock in the evening.

Q. Did you see the defendant come into Keith and Clara's? A. I did.

Q. Will you tell the jury what happened from the time he came in until this alleged assault took place?

A. He walked in through the door with a blonde-headed woman, walked up to the table with some other people—where some other people were seated, and talked with them a little bit and talking in a kind of a loud voice, and from there he [5] come over to the bar and ordered a drink and while they were drinking, just drinking the first order, he and this blonde-headed woman were arguing about some money that she owed him and something about the title of a car, and then he ordered a double shot for her and was going to make her drink it and she tried to beg off on this double shot. They turned and walked away from the bar and walked over to a table along the wall, the front wall, and he kept trying to force her to drink this drink and she says, "Just give me time, give me time, I'll make it." And after they drank this drink they walked outside and got into an argument out there, which I couldn't hear, could see trouble going on. She came back in crying, said "Just leave me alone, just leave me alone." She walked over to a table at the south end of the building and sat down and

(Testimony of David E. Thompson.)

evidently it quieted their nerves and she says, "I need a drink." She got up and walked over towards the bar. The defendant followed her. He was standing between me and the lady and he asked the bartender for a drink and the bartender said "No, she has had enough." He said, "Are you going to give her a drink, or do I have to whip you?" The bartender said "No, she has had enough." He reached in under his belt on his left hand and pulled out a gun. I watched it when it came out and I could see very plainly what kind of a gun it was. [6]

Q. Excuse me, were you sitting next to him?

A. I was sitting on his left-hand side.

Q. Go ahead. Excuse me.

A. I could see very plainly that he pulled the gun, what kind of a gun it was, and he pulled it like that (indicating) and said "Give her a drink." The bartender put up his hands and served the drink.

Q. Did you think the gun was loaded?

A. As near as I could possibly see, the clip was in it and ready for action. I watched that particularly because I figured on getting that gun myself if there was any possible chance.

Q. You figure the gun was armed and ready to fire?

A. Absolutely; if it hadn't been I would have tried to get it.

Q. Are you the gentleman that called the Highway Patrol? A. I am.

(Testimony of David E. Thompson.)

Q. Is there a telephone at Keith and Clara's?

A. No, I went to Fireweed and East G, Potter Road, to make the call.

Mr. Buckalew: Your witness.

Cross-Examination

By Mr. McCutcheon:

Q. Did you see any shells in the gun? [7]

A. There was no possible way you could see any shells in an automatic when the clip is in it.

Q. Just a normal looking automatic, wasn't it?

A. Yes, sir.

Q. No possible way for you to tell whether or not it was loaded from where you were standing?

A. Other than the fact that the clip was in it.

Q. Now, did you talk to the United States Attorney about whether or not the gun was loaded prior to coming into this courtroom? A. Sir?

Q. I repeat the question. Did you talk to the United States Attorney prior to coming into this courtroom about whether or not the gun was loaded?

A. Yes.

Mr. McCutcheon: No further questions.

Redirect Examination

By Mr. Buckalew:

Q. Mr. Thompson, what caliber weapon did you think it was?

A. It looked to me like a 25-caliber.

Mr. Buckalew: I do not have any more [8] questions.

(Testimony of David E. Thompson.)

Recross-Examination

By Mr. McCutcheon:

Q. Did you know that the blonde woman was Mrs. Randall?

A. I had no idea who she was. I had never seen her before.

Mr. McCutcheon: No more questions.

(The witness thereupon withdrew from the witness chair.)

Mr. Buckalew: Do you want the witness to stay around, Mr. McCutcheon?

Mr. McCutcheon: Yes, I do. I would like to have all Government witnesses stay here.

The Court: All witnesses then will remain in attendance unless they apply for excuse and are excused.

Mr. Buckalew: Call Patricia Ann Herrick.

PATRICIA ANN HERRICK

called as a witness on behalf of the plaintiff and, being first duly sworn, testified as follows:

Direct Examination

By Mr. Buckalew:

Q. Will you state your full name, please?

A. Patricia Ann Herrick.

Q. Your mother and father run Keith and Clara's place? A. Yes, they do. [9]

(Testimony of Patricia Ann Herrick.)

Q. Do you have a dining hall in there?

A. Yes, we do.

Q. And a bar? A. Yes.

Q. The bar is on one side and the dining hall on the other? A. Yes.

Q. Sometimes do you work in the dining hall?

A. Yes, I do.

Q. Were you working on the 16th day of July?

A. No.

Q. Were you present in it? A. Yes.

Q. Did you see the defendant?

A. Yes, I did.

Q. Do you recall about what time of the day you saw him in the——

A. About—I couldn't say exactly, but it was around 7:00.

Q. You heard Mr. Thompson's testimony?

A. Yes.

Q. Did you see the defendant pull a gun on Mr. Abernathy, the bartender? A. Yes.

Q. Where were you standing?

A. I was standing just a little behind him, about two feet between Mr. Thompson and Randall, just a little behind him. [10] I could see the gun.

Q. Did you hear the defendant order Mr. Abernathy to serve the woman a drink? A. Yes.

Q. Did you think the weapon was loaded?

A. Yes. I don't know, but I assumed it was the way he was using it.

Q. Did he point the gun at the bartender?

A. Yes.

(Testimony of Patricia Ann Herrick.)

Q. Like he was ready to shoot? A. Yes.

Mr. Buckalew: Your witness.

Cross-Examination

By Mr. McCutcheon:

Q. He pointed it at him like that? A. No.

Q. How did he point it at him?

A. He had it waist high, directly at him.

Q. Was no way for you to know whether or not the gun was loaded, was there? A. No.

Q. Did he pay for the drink? [11]

A. I didn't pay too much attention to that.

Q. Don't you recall whether or not he paid for the drink? A. No, I was really scared.

Q. You didn't observe whether or not he paid for the drink? A. No.

Q. Well, can you state positively that he did or did not pay for the drink, either way?

A. I couldn't tell you.

Q. Your memory hazy on that subject?

A. Well, I didn't pay any attention to whether he did or not.

Q. You paid attention to the gun, did you?

A. Oh, yes.

Q. Do you remember how long a barrel it had?

A. Pardon?

Q. Do you remember how long a barrel the gun had? How long was the barrel of the gun?

A. It was short. I could just see the barrel and

(Testimony of Patricia Ann Herrick.)

I would say it was about two inches. I don't know anything about a gun.

Q. Two inches long? A. Yes.

Q. Did you see a gun a little bit ago in the United States Attorney's office? A. Yes.

Q. Now, did you say that the barrel of the gun was about two inches long? [12]

A. I didn't—the only gun I saw was a big gun—I didn't see any little gun.

Q. You say the barrel of the gun you saw was about two inches long, is that correct?

A. Yes.

Q. Are you reasonably sure of that?

A. Yes.

Q. Do you know how long—about how long a foot is? A. Yes.

Q. You know approximately how long a foot is?

A. Yes.

Q. Now, do you know how long an inch is, approximately? A. Yes.

Q. Then you know how long a half an inch is, don't you? A. Yes.

Q. You know that two inches is a good deal longer than a half an inch, don't you?

A. Yes.

Q. About January 19th at Keith and Clara's you and I being present and other persons being present, did you not say in substance as follows: "It was a little tiny gun. The barrel stuck out about a half an inch." Did you not say that at that time and place?

(Testimony of Patricia Ann Herrick.)

A. Well, you asked me—I thought you meant the whole length of the gun. [13]

Q. Well, did you or did you not at that time and place say as follows, exactly——

Mr. Buckalew: Your Honor, I object to this because I don't know what took place and I don't know what questions he propounded to the witness.

Mr. McCutcheon: You will in a few moments, if you give me the time.

The Court: He is laying the foundation for impeachment. Go ahead.

Mr. McCutcheon: Miss Herrick, did you or did you not at that time and place with those persons present say as follows: "He paid for the drink and left"? Did you not say that at that time and place?

A. I don't remember.

Q. Do you recognize your initials when you see them?

A. If I said it on there I probably said it.

Q. Well, which is the true story then, Miss Herrick? The one you are telling now or the one you told on January 19th and signed? Now, answer this question: Did he pay for the drink or didn't he?

A. Well, I don't remember what I said. It has been a long time ago.

Q. Well, do you remember, Miss Herrick, which is the true story whether or not the barrel was two inches long or a half inch long? [14]

A. It seemed to me when you asked me that, you asked how much was showing.

(Testimony of Patricia Ann Herrick.)

Q. How much was showing?

A. About a half an inch. When you asked me how long the barrel was I thought you meant the whole length of it.

Q. How much of the barrel was showing?

A. About a half an inch.

Q. I see. Is that your testimony now?

A. Yes.

Q. Well, what did you mean by your testimony when you said the barrel was two inches long?

A. You asked me how long the barrel was; you didn't ask me how much was showing.

Q. Which is the correct testimony? That you didn't notice whether or not he paid for the drink or that he paid for a drink?

A. I don't remember now.

Mr. McCutcheon: Your witness. One more question.

Q. Did you see a gun in the United States Attorney's office a while ago? A. Yes.

Q. Did the United States Attorney ask you whether or not that was the gun? A. No.

Mr. McCutcheon: No further questions. [15]

Mr. Buckalew: No further questions.

(The witness thereupon withdrew from the witness stand.)

Mr. Buckalew: Call Mr. Abernathy.

PAUL ABERNATHY

called as a witness on behalf of the plaintiff and, being first duly sworn, testified as follows:

Direct Examination

By Mr. Buckalew:

Q. Will you state your full name, please?

A. Paul Abernathy.

Q. Were you a bartender on duty on the 16th day of July at Keith and Clara's? A. I was.

Q. You recognize the defendant? A. I do.

Q. Will you tell the jury the circumstances under which the gun was drawn?

A. They were over at the lunch counter at first and so they came over to the bar and were getting pretty drunk. I served them one more and they went over to the table and I was watching them pretty close. There were a few people in there at the time and they went outside in a rough way and he took Mrs. Randall out—the blonde woman and——

Mr. Buckalew: Excuse me. Will you talk a [16] little slower and a little louder? I don't believe all the jurors can hear you.

A. So when they was outside they come back in and went over to the lunch counter again, so were sitting over there. I don't know—she came back in crying—I don't know what happened. Came to the bar and asked for a drink. I refused them, so they said, "Give me a drink or going to be trouble," something like that. I am not sure of the words. Anyway, said "Give me a drink." Put his

(Testimony of Paul Abernathy.)

left hand down and throwed the gun on me, and said "Give me a drink." So I served them a drink and he did pay for his drink and they left.

Q. Did he point the gun directly at you?

A. Right straight at me, about three foot away from him across the bar.

Q. Did you think the gun was loaded?

Mr. McCutcheon: Objection. Objected to as an improper question.

The Court: Objection overruled.

Mr. Buckalew: Will you answer the question, please? A. Sir?

Q. Did you answer that question? Did you think the gun was loaded? A. Yes, sir; I sure do.

Q. Would you have served up a drink if he hadn't put the gun [17] on you?

Mr. McCutcheon: Object to it as improper.

The Court: Overruled.

A. No, sir, I wouldn't have served him, either one, if the gun hadn't been thrown on me.

Mr. Buckalew: Your witness.

Cross-Examination

By Mr. McCutcheon:

Q. Did you know whether or not the gun was loaded? A. I couldn't tell.

Q. All he said when he pointed the gun at you was that the total words spoken, he said, give me a drink? Nothing else. Is that what he said?

A. No, he said, give us a drink. Those are the words I hear said after I refused him twice.

(Testimony of Paul Abernathy.)

Q. That was all he said when he pointed the gun at you, was give us a drink?

A. That is true.

Mr. McCutcheon: No further questions.

The Court: Do you know whether he pulled the gun out of a pocket or out of a holster?

A. No, sir. Looked like to me under his belt, might have been [18] a little holster. I couldn't swear to it. Swung it about that high (indicating) across the bar right straight at me.

Q. Did he have a coat on, a jacket?

A. Yes, sir, he had a blue coat, a jacket, on.

The Court: That is all.

Redirect Examination

By Mr. Buckalew:

Q. Is that the first time you saw the weapon when he pulled it out? A. Yes, sir.

Q. Concealed up until that time?

A. Yes, sir, it was.

The Court: That is all.

Mr. Buckalew: I was going to ask him another question, your Honor.

Q. Could you tell from looking at it the caliber of the weapon?

A. No, sir, I couldn't. It looked like a 25-caliber to me. I wasn't positive if it was or not.

Q. A small caliber?

A. It was a small caliber.

Q. Did it look like an automatic type?

(Testimony of Paul Abernathy.)

A. Looked like an automatic. [19]

Mr. Buckalew: No further questions.

Mr. McCutcheon: No questions.

(The witness thereupon withdrew from the witness stand.)

Mr. Buckalew: Call Officer Howell.

DON F. HOWELL

called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows on

Direct Examination

By Mr. Buckalew:

Q. Will you state your full name, please?

A. Don F. Howell.

Q. Mr. Howell, were you one of the arresting officers in this case? A. Yes, sir.

Q. Do you recall about what time the defendant was arrested or apprehended?

A. The apprehension, I believe, was possibly between 11:30 and 12:00 o'clock on the 16th of July, I believe it was.

Q. Was the defendant driving a car?

A. Not at the time I got there.

Q. Do you recall where he was apprehended?

A. Yes, sir. At the—I believe it is the Stratton Service Station on the right of Spenard Road or where Fireweed Lane meets Spenard Road. [20]

Q. Do you know whether any weapons were taken out of the car?

(Testimony of Don F. Howell.)

A. Yes, sir, there was nine MM German type Luger automatics taken out of the glove compartment of the Buick in which he was riding.

Q. Did you search the defendant's person?

A. Yes, sir.

Q. Find any small automatic on him?

A. No, sir.

Q. Did you observe anything unusual about the defendant's right hand?

A. Yes, sir, there was what appeared to me was a bullet hole through his right ring finger and his little finger.

Q. Did you take a picture of the defendant's hand? A. I did.

Q. Did you bring those pictures?

A. I did.

Q. Do you have them with you?

A. Yes, sir.

Q. Can I see them, please?

(The pictures were then handed to Mr. Buckalew, who in turn gave them to defendant's counsel for examination.)

Mr. McCutcheon: Objected to on several grounds, your Honor. One, no proper foundation has been laid. No. 2—I can't see what that has to do with the crime that this man is charged with. I don't see that that is material and I make the [21] objection on that ground.

Mr. Buckalew: Your Honor, I believe that it is relevant and will show by the circumstantial evi-

(Testimony of Don F. Howell.)

dence that the weapon was loaded because shortly thereafter—I will establish the time—the wound was inflicted in the defendant's hand. I can show by an expert witness that the puncture is of the size of about a 25-caliber.

The Court: Well, do the photographs themselves have any evidentiary value. However, let's see them first.

Mr. Buckalew: I believe they do show the condition of the hand at the time of the arrest. You can see that it was a fresh wound, that the blood is still dripping from, I believe, one of the little fingers.

Mr. McCutcheon: He has everything but the pictures in evidence now.

The Court: Well, these may be marked for identification until there is some evidence introduced as to the size of the holes or what caliber bullet could have caused them.

Mr. Buckalew: Fine, your Honor.

Mr. McCutcheon: Is my objection sustained at this time?

The Court: Well, it is sustained to the offer, yes.

Q. (By Mr. Buckalew): Did you ask the defendant how he got the wound?

A. Yes, sir. [22]

Q. What did he tell you?

A. Stated that he'd hurt his hand on the tailgate of his truck which was later learned to be in Kenai.

Mr. Buckalew: Your witness.

(Testimony of Don F. Howell.)

Cross-Examination

By Mr. McCutcheon:

Q. Were you the one that found the gun in the glove compartment of the automobile?

A. It was one of the officers, yes.

Q. Were you standing there when the gun was discovered? A. Yes, sir.

Q. Did you look at the gun at that time?

A. No, sir.

Q. Was it loaded? A. No, sir.

Mr. McCutcheon: No questions. One more question.

Q. Were there cartridges in the glove compartment?

A. I did not look in the glove compartment myself.

The Court: That all?

Mr. Buckalew: That is all.

(The witness thereupon withdrew from the witness stand.)

The Court: We will recess for five minutes. [23]

(After a short recess Court re-convenes and the following proceedings were had.)

Mr. Buckalew: Call Dr. O'Malley.

JAMES E. O'MALLEY

called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Buckalew:

Q. State your full name, please.

A. James E. O'Malley.

Q. Dr. O'Malley? A. Yes.

Mr. McCutcheon: Waive the Doctor's qualifications.

Mr. Buckalew: Doctor, do you recall looking at the defendant's hand sometime around the 16th day of July, 1952? A. I believe I do.

Mr. Buckalew: Could I have the exhibit, please?

(The witness thereupon handed to Mr. Buckalew the exhibit which had been marked for identification, the photographs.)

Q. Will you look at these photographs and see if you can recognize them?

A. Yes, I'd say that was the same hand I looked at.

Q. What type of wound is it, Doctor?

Mr. McCutcheon: Just a moment before you answer that, [24] Doctor. Object to the line of questioning, if the Court please, on the grounds that it does not in any way relate to the crime charged. It has absolutely nothing to do with the crime charged. The man is charged with assault with a deadly weapon. Might the objection show that it is an improper question and irrelevant and immaterial.

(Testimony of James E. O'Malley.)

The Court: For the purpose of showing the caliber or approximate caliber of the bullet which caused the wound, the objection is overruled.

Mr. Buckalew: That's the purpose of it, your Honor.

The Court: Go ahead.

Q. (By Mr. Buckalew): Did you examine the wound, Doctor? A. I did.

Q. Was it made—was it a gunshot wound?

A. If it please the Court, could I tell the circumstances under which I examined this man? This man was brought to me by the Deputy Marshal with no history and had me to look at the hand and asked me what caused that wound, and I said a gunshot wound, probably a 25-caliber weapon.

Q. Did you ask the defendant how he got the wound?

A. He said he got it caught in the tailgate of a wagon.

Q. Wagon? A. Some vehicle.

Q. What did you tell the defendant? [25]

A. I told him he was a liar.

Mr. McCutcheon: Objected to. The question was: What did you tell the defendant?

The Court: He answered and told him he was a liar.

Mr. Buckalew: It was in the presence of the defendant, nothing improper about that. Your witness.

Mr. McCutcheon: Had the witness answered the question, if the Court please?

The Court: Yes.

Mr. McCutcheon: I didn't hear it. No questions.

Mr. Buckalew: The Government rests, your Honor.

(The witness, Dr. O'Malley, thereupon withdrew from the witness stand.)

The Court: You ready to go on with the defense?

Mr. McCutcheon: No, we are not. If the Court please, I would like to have the opportunity at noon time to prepare some proposed instructions. I had not the slightest idea the Government's case would go so quickly. I propose to subpoena some witnesses.

The Court: You can submit the instructions any time before the evidence is closed. You have no witnesses to go on now?

Mr. McCutcheon: I contemplate putting a witness on the stand, but the witness will be subpoenaed for whatever time the Court adjourns to. [26]

The Court: That means you have no witness now that you can put on in your defense?

Mr. McCutcheon: Not that I choose to put on at this time.

The Court: Well, if we adjourn or recess to 2:00, there would not be any difficulty in concluding today, would there?

Mr. McCutcheon: None whatsoever.

The Court: We will recess then to 2:00 p.m.

(Thereupon, at 11:26 o'clock a.m., March 5, 1953, the Court recessed and continued the cause to 2:00 o'clock p.m. of the same day.)

(At 2:00 o'clock p.m., March 5, 1953, counsel for plaintiff and defendant being present and defendant being present in person, the Deputy Clerk calls the roll of the trial jury, each answered to his or hear name, and the trial of said cause is resumed.)

The Court: You may proceed.

Mr. McCutcheon: I have some proposed instructions, if the Court please. May I approach the bench?

The Court: You may submit them. You may call your next witness.

(The proposed instructions were handed up to the Court.)

Mr. McCutcheon: The Government has [27] rested?

The Court: Yes.

Mr. McCutcheon: I would like to recall Mr. David Thompson to the stand, please.

DAVID E. THOMPSON

re-called as a witness on behalf of the defendant, having been previously sworn, testified as follows on

Direct Examination

By Mr. McCutcheon:

Q. Mr. Thompson, you were subpoenaed by the Government to appear here, were you not?

A. I was.

(Testimony of David E. Thompson.)

Q. At the time and place of this alleged incident what were you doing at Keith and Clara's?

A. I was sitting at the end of the bar having a drink.

Q. Which end of the bar—the Seward end or the Anchorage end? A. Seward.

Q. At the very end of the bar were you?

A. Just at the bend in the bar.

Q. You were on Mr. Randall's left?

A. Sir?

Q. You were on Mr. Randall's left?

A. That is right.

Q. To his left? A. That is right. [28]

Q. And he took this gun out of his belt or whatever he had it with his left hand, did he not?

A. That is right.

Q. And you say it was a small gun, was it?

A. Positively.

Q. You saw a Luger in the United States Attorney's office before this trial commenced, did you?

A. I did.

Q. That wasn't the gun, was it? A. No.

Q. But the gun was approximately the size of a small or a 25-automatic, isn't that so?

A. Yes, sir.

Q. That has a very short barrel?

A. Very.

Q. And you, of course, assumed that it was loaded? A. Absolutely.

Q. And I think you testified this morning that you could see that it had the clip in it ready to go?

(Testimony of David E. Thompson.)

A. I did, yes, sir.

Q. You observed that closely, of course?

A. I did.

Q. You also could see the barrel, could you?

A. I could see the barrel and I could also see the butt of the gun when he pulled it out from underneath his trouser belt. [29]

Q. Do you recall my visiting with you on January 19th, at your home out near Keith and Clara's?

A. I do.

Q. And at that time and place and with persons present other than you and I, you made some statements to me, did you not? A. I did.

Q. And signed your name to it? A. I did.

Q. Let me ask you if you did not say on that—at that time and place and with those persons present—he held it so. All I could see was the barrel of the gun?

A. When he was holding it like that.

Q. Did you not make that statement at the time and place?

A. When he was holding it like that, yes.

Q. Answer the question. Did you not make the statement and sign it at the time and place?

A. Yes, sir, I did.

Q. Well, when was it that you remembered seeing the clip in the gun?

A. I remember seeing it at all times.

Q. Including the time of our conversation out there?

A. Yes, but I wasn't asked that question then.

(Testimony of David E. Thompson.)

Q. Well, that was the statement you made, wasn't it?

A. I made the statement that when he held it, all I could see [30] was the barrel of the gun.

Q. He took it out of his belt with his left hand?

A. Right.

Q. Right or left? A. With his left hand.

Q. Right or left?

A. With his left hand. I see it in his left hand.

Q. You are positive of that, are you?

A. That is right.

Q. Do you know a 25-automatic when you see one? A. I do.

Q. And isn't it true that most all 25 automatics are the same size by either American manufacturers or foreign manufacturers? That are all the same size approximately?

A. Pretty close to it.

Q. Nothing unusual about this 25-automatic was there? A. Not a bit.

Q. Did you tell the United States Attorney today that it was a 25-automatic?

A. I don't remember whether I told him today or yesterday.

Q. Had you ever told him prior to that time that it was a 25-automatic?

A. I never talked to him prior to that.

Q. Did he show you the Luger in his office?

A. Yes. [31]

Q. Did he ask you whether or not that was the

(Testimony of David E. Thompson.)

gun? Did he ask you whether or not that was the gun? A. Yes.

Q. What did you tell him?

A. I told him, no.

Q. Now, did any part of the barrel of this 25-automatic stick out beyond his hand?

A. There was only just a small fraction of the barrel could stick out of the frame of an automatic gun of that type.

Q. So when he held it in his hand all you could see was the barrel, isn't that correct?

A. That is right, the frame, rather the frame of the gun.

Q. You could see the frame of the gun?

A. That is right.

Q. And the clip at the bottom?

A. That is right, you could see the clip of the gun when he pulled it out, not when he was holding it like that.

Q. How long did he hold the gun on the bartender?

A. I haven't any idea. I slipped off the stool and went out to get the license number of all the cars in the lot.

Q. Immediately?

A. As soon as I could slip off, yes; it might have been a matter of two or three seconds, still holding the gun on him when I left.

Q. And what did he say to the bartender? [32]

A. Give her a drink.

Q. What else did he say?

(Testimony of David E. Thompson.)

A. That's all I know of.

Q. That's all that you can recall?

A. Prior to that? No, he says, are you going to give her a drink or do I have to whip you.

Q. You sure he said that? A. I am.

Q. What color was the gun?

A. It looked to me like it was either a worn metal or nickel plated.

Q. Nickel plated? A. Yes.

Q. What part of it was nickel plated?

A. All I could see tof it.

Q. You mean bright nickel plated?

A. Well, it wasn't very light in there. You couldn't tell whether it was very bright—light color.

Q. You mean nickel plated it was a bright silver color, is that what you mean? A. Yes.

Q. And was the handle nickel plated?

A. I couldn't see the handle. His hand had the handle covered up. I could just see the bottom of the butt.

Q. When did you see the bottom of the [33] butt?

A. Had it sideways—like that (indicating)—pulled it from underneath his trousers, suit, from underneath the belt.

Q. Was the barrel nickel plated?

A. The frame that was visible was nickel plated.

Q. And you don't know, of course, what color the handle was?

A. Couldn't see the handle, just the bottom of the butt.

(Testimony of David E. Thompson.)

Q. What color was the bottom of the butt?

A. The bottom of the butt looked to me like it was nickel plated.

Q. The bottom of the butt was also nickel plated?

A. All you could see of the butt is just the edge of it where the clip fits in.

Mr. McCutcheon: That is all.

Cross-Examination

By Mr. Buckalew:

Q. Was the gun completely concealed?

A. Completely concealed.

Q. And did he fish it from underneath his belt?

A. That is right. It was not visible until he reached for it and pulled it out.

Mr. Buckalew: I have no further [34] questions.

By Mr. McCutcheon:

Q. Did you look and see if it was or not before he pulled it? (Pause) Did you look to see whether it was or not before he pulled it out?

A. Walking around with his jacket open and nothing in sight.

Q. And you say nothing in sight?

A. Nothing in sight.

Q. You looked to see whether there was on not?

A. I could see there was no gun there.

Mr. McCutcheon: No further questions.

Mr. Buckalew: Call Miss Herrick back to the stand, please.

The Court: Is this going to be an examination all over again like with the witness Thompson? I cannot permit that. It has to be something you overlooked before.

Mr. McCutcheon: Perhaps something has come up with this witness' testimony. When I ask the questions your Honor can rule.

The Court: Very well, I want to call attention to the fact that because we take a recess or something of that sort, it does not give counsel a right to re-examine the witness entirely. [35]

Mr. McCutcheon: I assumed I could go ahead with the witness. I heard no objection out of the Government.

The Court: It makes no difference. If the Court permitted a complete re-examination every time counsel has had a few hours to think about it, we would never get through. It you recall a witness, it has to be for something you overlooked before.

Mr. McCutcheon: Yes, sir, I assure you it will be something that will be new. Call Miss Herrick.

PATRICIA ANN HERRICK

re-called as a witness on behalf of the defendant, having previously been sworn, testified as follows on

Direct Examination

By Mr. McCutcheon:

Q. Miss Herrick, you testified this morning you saw the gun, did you not? A. Yes.

(Testimony of Patricia Ann Herrick.)

Q. What color was it?

A. It was light and shiny.

Q. It was light and shiny?

A. The color was silver.

Q. Silver in color? A. Yes.

Q. Now, do you recall on January 19th, when I visited you out [36] at Keith and Clara's, you made a statement and signed it? A. Yes.

Q. Did you or did you not at that time and place and with you and other persons present, say as follows: It was dark in color. Did you or did you not at that time and place say that?

A. I did, said it was shiny.

Q. Did you or did you not at that time and place?

A. Of course, I did. I remember I signed it, don't remember what I signed.

Q. Are these your initials? A. Yes, sir.

Q. Let me ask you once more. I am going to ask whether or not at that time and place, with you and I and other persons present, you did not make this statement and sign it: It was a little gun; the barrel stuck out about a half inch from his finger. The barrel was lighter than the handle. It was dark in color. Did you or did you not make that statement?

A. I don't remember. I probably did if it was on there.

Q. What was your answer?

A. I probably did if it is on there.

Q. Well, which time are you telling the truth? The time you made the statement or the answer to

(Testimony of Patricia Ann Herrick.)

the question I just put to you a moment ago? [37]

A. Well, I said it was shiny in color.

Q. Was it dark or light?

A. Well, it was kinda two different colors. I mean the top part looked shiny, I remember that—the barrel—I don't remember all of it.

Q. What part did you see?

A. Well, I can't remember now.

Q. Well, can you remember what part of the gun you saw? Did you see any part of the gun?

A. Yes.

Q. What part of it did you see?

A. I saw part of the barrel.

Q. What color was the part of the barrel?

A. Shiny in color.

Q. Was it light or dark? Dark and shiny or light and shiny?

A. It was a kind of silver tone—grayish silver tone.

Q. What else of the gun did you see?

A. I saw a dark part of it.

Q. I beg your pardon?

A. I don't remember what part of it. I don't know anything about guns. I couldn't tell you one part from the other, except the barrel and the handle.

Q. When you made this statement: it was dark in color, what part of the gun had you seen that was dark in color?

A. Probably the bottom of it. [38]

(Testimony of Patricia Ann Herrick.)

Q. Well, do you remember when you saw the bottom of it? A. No, I don't.

Q. Then is the witness that preceded you to the stand mistaken whe he said, it was nickel plated, the bottom of it?

The Court: I don't think there was any testimony of that kind.

Mr. McCutcheon: I beg your Honor's pardon. I believe there was. It would be important, if the Court please, to clear up that point in view of your Honor's comment. It was my recollection that the butt of the gun was also nickel plated.

The Court: What is the question now?

Mr. McCutcheon: I am concerned now about your Honor's comment.

The Court: What is the question?

Mr. McCutcheon: The question was, or the statement of the witness was, that the butt of the gun was dark in color. In answer to my question, which part of it was dark in color, she said the butt. That's an opinion, if the Court please, and your Honor said following that, you didn't recall any such testimony.

The Court: No, I don't recall. You just answer the question the way you remembered yourself, regardless of what anybody else testified. Go ahead and answer it.

Mr. McCutcheon: The last question, I believe, I asked the witness was—was the witness who just preceded you to the [39] witness stand mistaken when he said the butt of the gun was nickel plated?

(Testimony of Patricia Ann Herrick.)

The Court: It is improper for one witness to give an opinion on whether another witness is mistaken, so you will have to ask some other question.

Q. (By Mr. McCutcheon): Was the butt of the gun nickel plated or was it dark in color?

A. I don't remember. All I know it was a gun and I was scared and I wasn't paying any attention.

Q. Just answer me that. You don't remember—was that your answer—I don't remember?

A. I didn't say it was nickel plated.

Q. Just a moment now, was your answer I don't remember? Is that your answer?

A. What question?

Q. I asked you whether or not the butt of the gun was nickel plated and I am asking you now what is your answer to that question. I don't mean to be rude to you but, this is a very serious matter. Now, my question to you was, I believe, was the butt of the gun nickel plated and I think I understood your answer to be: I don't remember. Was that your answer?

The Court: She has answered it half a dozen times.

Mr. McCutcheon: Differently, if the Court please, each [40] time.

The Court: She answered it last that she thought the butt was light or silver in color and the handle a dark color. That is her testimony.

Mr. McCutcheon: That is not my recollection of her testimony. I believe that, your Honor—I believe your Honor's remarks are improper and I take exception to them.

(Testimony of Patricia Ann Herrick.)

The Court: You can take exception to them. It is the Court's duty to protect the witness from so much questioning over one detail.

Mr. McCutcheon: Yes, sir, I am only trying to point out her inconsistent statements and I believe, if you will allow me to have the record read back to you, sir, that her last answer to the last question as to whether or not the butt of the gun was nickel plated, her answer was that I don't remember.

The Court: She has answered it once and that is enough. We are not going into it any more.

Mr. McCutcheon: You may step down, if there are no questions by the Government.

(The witness thereupon withdrew from the witness stand.)

Mr. McCutcheon: Is Mrs. Margaret Martin in the courtroom? The defense rests.

The Court: You may make your opening argument unless you have rebuttal. [41]

Mr. Buckalew: I do not have any rebuttal, your Honor.

The Court: You may make your opening argument then. [42]

* * *

Mr. McCutcheon: If the Court please, I would like to, before your Honor instructs the jury, ask counsel for the [56] Government if he will not stipulate with the defense that the photographs that he attempted to have put in evidence this morning—I think they were marked for identification only—never went into evidence——

The Court: Well, you wish to have them in evidence?

Mr. McCutcheon: That is just about what I was about to ask him, if he will put them in evidence.

The Court: They may be introduced in evidence.

Mr. Buckalew: No objection.

(Whereupon, the Deputy Clerk marks the two photographs of a hand, previously marked for identification, as Plaintiff's Exhibits 1 and 2.)

Whereupon, the Court reads the instructions to the Jury.

The Court: Any exceptions?

Mr. McCutcheon: Did your Honor ask if there were any exceptions?

The Court: Yes.

Mr. McCutcheon: The defendant excepts to the failure of the Court to include Defendant's Instructions 1 and 2, contend that it is in the clear with the Court's instructions as given. An unloaded gun is not a dangerous weapon within the [57] meaning of the statute in the light of the testimony given. Let's see—I assume that our proposed instructions are filed—if they are not——

The Court: Yes, they are here.

Mr. McCutcheon: Very well, sir.

The Court: The bailiffs may now be sworn.

(Whereupon, the Deputy Clerk swears Thomas Merton and T. L. Langford, as bailiffs in charge of the trial jury.)

The Court: The jury will now retire to the jury room to deliberate on the verdict in charge of the bailiffs.

(Whereupon, the trial jury in charge of Bailiffs Thomas Merton and T. L. Langford retire to the jury room.)

The Court: You may adjourn court to 10:00 o'clock tommorrow morning.

Whereupon at 3:13 o'clock p.m., on March 5, 1953, the Court continued the cause to 10:00 o'clock a.m., on the following day, March 6, 1953. [58]

Whereupon, at 10:00 o'clock a.m., March 6, 1953, the trial jury in charge of their sworn bailiffs, Thomas Merton and T. L. Landford, returned to the courtroom and the following proceedings were had:

The Court: Has the jury reached a verdict?

The Forman: We have, your Honor.

The Court: You may hand it to the bailiff.

Whereupon, the foreman hands the verdict to the bailiff, who in turn hands it to the Court, and the Court hands the verdict to the Deputy Clerk.

Deputy Clerk: (reading)

In the United States District Court for the District of Alaska, Division Number Three at Anchorage

No. 2779 Cr.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DON MAURICE RANDALL,

Defendant.

VERDICT No. I

We, the jury, find the defendant guilty of assault with a dangerous weapon as charged in the indictment.

Dated at Anchorage, Alaska, this 5th day of March, 1953. [60]

Signed by Anthony Schnabel, Jr., Foreman.

The Court: Is the bail sufficient in this case?

Mr. Buckalew: I am not familiar with the bail. I think it is $5,000 but I do not know about the bond. I have not checked it and I do not know whether it is sufficient or not.

Mr. McCutcheon: If the Court please, the bail is a cash bail and it is $2500. The defendant has just completed the construction of a hotel in Kenai, he and his wife. It is probably conservatively worth about $40,000.

The Court: Has the clerk any recollection of the form of the bail in this case?

Deputy Clerk: I have not, your Honor, but I can check in a very few minutes.

The Court: You know of your own personal knowledge that it is $2500, cash?

Mr. McCutcheon: Yes, sir, I do.

The Court: Well, I am inclined to think for an offense of this kind that $2500 is too little so I will have to commit the defendant to the custody of the Marshal. The Marshal will take him into custody and the time for sentence is fixed as Mondany morning 10:00 o'clock.

Mr. McCutcheon: Would your Honor fix what your Honor considers a reasonable bail?

The Court: If the bail were doubled the Court would not admit him to bail pending sentence. [61]

Mr. McCutcheon: Very well, your Honor.

United States of America,
Territory of Alaska—ss.

I, Bernice E. Phillips, Official Reporter of the above-entitled Court, hereby certify:

That the foregoing is a full, true and correct transcript of the Transcript on Appeal in the above-entitled matter taken by me in stenotype in open Court at Anchorage, Alaska, on March 5 and 6, 1953, and thereafter transcribed by me.

/s/ BERNICE E. PHILLIPS.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, M. E. S. Brunelle, Clerk of the above-entitled Court, do hereby certify that pursuant to the provisions of Rule 11(1) of the United States Court of Appeals for the Ninth Circuit, as amended, and pursuant to the provisions of Rules 75 (g) (o) of the Federal Rules of Civil Procedure and pursuant to designation of counsel, I am transmitting herewith the original papers in my office, dealing with the above-entitled action or proceedings, including the bill of exceptions setting forth all the testimony

taken at the trial of the cause, and all of the exhibits introduced by the respective parties, such record being the complete record of the cause pursuant to the said designation.

The papers herewith transmitted constitute the record on appeal from the Judgment filed and entered in the above-entitled cause by the above-entitled court on March 18, 1953, to the United States Court of Appeals at San Francisco, California.

[Seal] /s/ M. E. S. BRUNELLE,
Clerk of the District Court for the District of Alaska, Third Division.

[Endorsed]: No. 13934. United States Court of Appeals for the Ninth Circuit. Don Maurice Randall, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Third Division.

Filed: September 28, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13934

DON MAURICE RANDALL,

Appellant,

vs.

UNITED SATES OF AMERICA,

Appellee.

STATEMENT OF POINTS RELIED ON ON APPEAL

Appellant herewith states that on this Appeal he intends to rely upon the following points:

I.

The trial Court erred in denying defendant's Motion, dated February 24, 1953, for postponement or continuance of the trial.

II.

The Court erred in admitting testimony of witnesses, David E. Thompson and Patricia Ann Herrick, that they thought the gun was loaded.

III.

The Court erred in admitting the testimony of Dr. James E. O'Malley concerning the caliber of the gunshot wound in defendant's hand.

IV.

The Court erred in submitting to the jury the crime charged in the Indictment, Assault with Dan-

gerous Weapon, since there was insufficient evidence that the gun was loaded.

V.

The Court erred with respect to its instructions to the jury in the following respects, (a) in failing to give defendant's requested instruction No. 1. (b) In failing to adequately instruct the jury as to the distinction between the crime of Assault with Dangerous Weapon and the included offense of Simple Assault. (c) In failing to instruct on circumstantial evidence.

HENDERSON, CARNAHAN,
THOMPSON & GORDON,

HARRY SAGER,

Attorneys for Appellant.

[Endorsed]: Filed October 3, 1953.

No. 13934

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DON MAURICE RANDALL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA, THIRD DIVISION

HONORABLE GEORGE W. FOLTA, *District Judge*

HENDERSON, CARNAHAN, THOMPSON & GORDON,
HARRY SAGER,

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No. 13934

IN THE

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DON MAURICE RANDALL,

Appellant,

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BRIEF OF APPELLANT

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HONORABLE GEORGE W. FOLTA, *District Judge*

HENDERSON, CARNAHAN, THOMPSON & GORDON,
HARRY SAGER,

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STATUTES AND RULES

CASES

CASES *(Continued)*

TEXT BOOK

No. 13934

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DON MAURICE RANDALL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA, THIRD DIVISION

HONORABLE GEORGE W. FOLTA, *District Judge*

JURISDICTION

The defendant was charged in the District Court for the Territory of Alaska, Third Division, by an indictment alleging an assault with a dangerous weapon in violation of Section 65-4-22, Alaska Compiled Laws Annotated, 1949 (Tr. 3). Jurisdiction in the District Court was by virtue of 48 U. S. C. 101 and 103.

After trial to a jury a verdict of guilty was entered on March 5, 1953 (Tr. 64). A written judgment and sentence was entered on March 18, 1953 imposing a term of imprisonment of 2½ years (Tr. 24). Notice of Appeal was filed on March 19, 1953 (Tr. 25). This Court has jurisdiction of the appeal by authority of 28 U. S. C. 1291 and 1294(2).

STATEMENT OF THE CASE

The indictment alleged that on July 16, 1952 in the Third Judicial Division, Territory of Alaska, the defendant being then and there armed with a dangerous weapon, to-wit, a revolver, did then and there assault one Paul Abernathy by pointing said gun at said Paul Abernathy and threatening to do him bodily harm if a drink of intoxicating liquor was not served to the said Paul Abernathy and his companion. (N.B. the Government's evidence showed that the demand upon the bartender was that he serve liquor to the defendant and his wife). The section of the Alaska laws under which the charge was made is as follows:

> "That whoever, being armed with a dangerous weapon, shall assault another with such weapon, shall be punished by imprisonment in the penitentiary not more than ten years nor less than six months, or by imprisonment in the County jail not more than one year nor less than one month, or by fine of not less than $100.00 nor more than $1000.00." ACLA, 1949, §65-4-22.

The trial of this cause was set for March 5, 1953. On February 24, 1953 defendant's then attorneys filed a motion for a continuance of the time of trial (Tr. 5). Said motion was supported by an affidavit of Dr. Walter Scott Brown stating that the defendant had been severely injured in an automobile accident on January 23, 1953, resulting, among other things, in post brain concussion and occasional fainting spells, and expressing the opinion that he was then in no mental state to carry on business affairs (Tr. 5). This motion was denied on February 27, 1953 (Tr. 7).

Again on March 4, 1953, the day before the trial setting, a further motion for continuance was filed (Tr. 7), supported by the statement of Dr. Richard O. Sellers and the affidavit of Stanley McCutcheon (Tr. 8). These supporting documents indicate that the defendant was in no physical or mental condition to proceed to trial. This motion was denied on March 4, 1953 (Tr. 11), and the cause proceeded to trial the following day.

The prosecution produced the following witnesses in support of the charge: Paul Abernathy, the alleged victim (Tr. 39); Patricia Ann Herrick, a young girl present at the time of the alleged assault (Tr. 33); David E. Thompson, a bystander at the time of the alleged assault (Tr. 29); Don F. Howell, the arresting

officer (Tr. 42); and Dr. James E. O'Malley, who purported to testify as an expert witness (Tr. 46).

Paul Abernathy testified that he was a bartender at Keith and Clara's on July 16, 1952; that the defendant came into the barroom with his wife; that they were in and out of the bar once or twice and were pretty drunk (Tr. 39); that the defendant asked for a drink and he refused them; that the defendant again demanded a drink and threatened trouble if it was not served; that the defendant then drew a gun and pointed it at the witness across the bar and he then served them a drink (Tr. 40).

"Q. Did you think the gun was loaded?

Mr. McCutcheon: Objection. Objected to as an improper question.

The Court: Objection overruled.

Q. Did you answer that question? Did you think the gun was loaded?

A. Yes, Sir; I sure do.

* * * * * *

Q. Did you know whether or not the gun was loaded?

A. I couldn't tell." (Tr. 40).

He further testified that the gun looked like a 25 caliber. He was not positive if it was or not. It was a

small caliber of an automatic type. Also that the defendant pulled the gun from underneath his jacket from some concealed position (Tr. 41).

Miss Herrick was the daughter of the proprietors of the tavern (Tr. 33). She worked there occasionally but not on the day of the assault, although she was present. She observed the defendant pulling a gun on the bartender, at which time she was standing about two feet behind him. She heard the defendant order the bartender to serve a drink.

"Q. Did you think the weapon was loaded?

A. Yes. I don't know, but I assumed it was the way he was using it. (Tr. 34).

* * * * *

Q. Was no way for you to know whether or not the gun was loaded, was there?

A. No." (Tr. 35).

She further testified that the gun was small, about a two-inch barrel. (Tr. 36).

David E. Thompson testified that he was at Keith and Clara's on the evening of the alleged assault; that it was around 7 P. M. (Tr. 29 and 30). At that time the defendant and a blond woman came into the establishment, they did some talking in a loud voice and had a drink or two. They were arguing about something (Tr. 30). After some period of this the two of

them went to the bar and asked for a drink for the woman. The bartender refused. The defendant said "Are you going to give her a drink or do I have to whip you?" The bartender refused again and the defendant reached under his belt and pulled out a gun. The witness was sitting at the bar to the left of the defendant. He could see plainly what kind of a gun it was. The defendant again demanded a drink and the bartender complied (Tr. 31).

"Q. Did you think the gun was loaded?

A. As near as I could possibly see, the clip was in it and ready for action. I watched that particularly because I figured on getting that gun myself if there was any possible chance.

Q. You figure the gun was armed and ready to fire?

A. Absolutely; if it hadn't been I would have tried to get it." (Tr. 31).

On cross examination he testified (Tr. 32):

"Q. Did you see any shells in the gun?

A. There was no possible way you could see any shells in an automatic when the clip is in it. * * *

Q. No possible way for you to tell whether or not it was loaded from where you were standing?

A. Other than the fact that the clip was in it."

He further testified that the gun looked like a 25 caliber (Tr. 32).

Don F. Howell arrested the defendant between 11:30 and 12 o'clock P. M. on the night of the alleged assault (Tr. 42). The defendant's car and person were searched and no small automatic was found. However, a 9 millimeter German type Luger was found in the glove compartment (Tr. 43). Two fingers of the defendant's right hand were wounded at the time and the witness took pictures of the wound (Tr. 43). The defendant told the witness that his hand had been hurt on the tail gate of his truck, which he later learned to be then in Kenai (Tr. 44). The German Luger found in the defendant's truck was not loaded (Tr. 45).

Dr. James E. O'Malley saw the defendant's hand "sometime around the 16th day of July, 1952." The photograph of the hand identified by Howell was of the hand the doctor looked at (Tr. 46).

"Q. What type of wound is it, Doctor?

Mr. McCutcheon: Just a moment before you answer that, Doctor. Object to the line of questioning that it does not in any way relate to the crime charged. It has absolutely nothing to do with the crime charged. The man is charged with assault with a deadly weapon. Might the objection show that it is an improper question and irrelevant and immaterial.

The Court: For the purpose of showing the

caliber or approximate caliber of the bullet which caused the wound, the objection is overruled.

Mr. Buckalew: That's the purpose of it, your Honor.

The Court: Go ahead.

Q. (By Mr. Buckalew): Did you examine the wound, Doctor?

A. I did.

Q. Was it made—was it a gunshot wound?

A. If it please the Court, could I tell the circumstances under which I examined this man? This man was brought to me by the Deputy Marshall with no history and had me look at the hand and asked me what caused that wound, and I said a gunshot wound, probably a 25-caliber weapon." (Tr. 46 and 47).

The defendant offered no evidence except to re-call the Government's witnesses, Thompson (Tr. 49) and Herrick (Tr. 56), and cross examine them in further detail.

ASSIGNMENTS OF ERROR RELIED ON

1. The Court erred in denying defendant's motion for trial continuance.

2. The Court erred in admitting testimony of witnesses David E. Thompson (Tr. 31) and Patricia Ann Herrick (Tr. 34) that they thought the gun was loaded.

3. The Court erred in admitting over defendant's objection the testimony of Dr. James E. O'Malley concerning the caliber of the bullet which inflicted the wound in defendant's hand (Tr. 46 and 47) on two grounds:

(a) The witness was not qualified as a balistics expert;

(b) The testimony of the witness (Tr. 47) is not a statement of opinion.

4. The Court erred in submitting to the jury the charge of assault with a dangerous weapon since there was no sufficient evidence that the gun was loaded.

5. The Court erred in its instructions:

(a) In failing to give defendant's requested Instruction No. 1;

(b) In failing to adequately instruct the jury as to the distinction between assault with a dangerous weapon and simple assault;

(c) In failing to instruct on circumstantial evidence.

As to (a) and (b) the defendant took exceptions. (Tr. 62).

ARGUMENT

Assignment of Error No. 1:

The Court erred in denying defendant's motion for trial continuance.

The question of granting a continuance of trial is a matter almost entirely within the discretion of the trial Court. It will be considered on appeal only for obvious abuse of that discretion.

Wolfe v. U. S., 64 Fed. (2) 566 (9th C.C.A.).
LaFeber v. U. S., 59 Fed (2) 588.
Vanse v. U. S., 53 Fed (2) 346.

With full recognition of this rule, however, it seems to us the lower Court should have granted a continuance. The two written motions (Tr. 5 and 7) and the oral motion at the commencement of the trial (Tr. 27) were supported by a substantial showing of the mental and physical disability of the defendant and his inability to testify or effectively defend himself. There was no controversion of this showing and yet the trial Court summarily denied the motions.

Assignment of Error No. 2:

The Court erred in admitting testimony of the witnesses David E. Thompson (Tr. 31) and Patricia Ann Herrick (Tr. 34) that they thought the gun was loaded.

The testimony to which this assignment is directed appears verbatim ante, pages 5 and 6. In each

instance the witness was permitted to testify that they thought the gun was loaded despite their other testimony that there was no way for them to know whether or not it was loaded, to-wit:

"Q. Did you see any shells in the gun?

A. There was no possible way you could see any shells in an automatic when the clip is in it." (Thompson's testimony Tr. 32)

Q. Was no way for you to know whether or not the gun was loaded, was there?

A. No." (Miss Herrick's testimony Tr. 35)

It should be noted also that the objectionable testimony was not the result merely of a volunteered statement by the witnesses but that in each instance it was in response to a direct question from the prosecuting attorney as to what the witness *thought*. We emphasize the seriousness of admitting this testimony because, as will be hereinafter shown, the record is devoid of any direct testimony as to the gun being loaded. That the gun was loaded was one of the essential elements requisite to establish the crime charged, namely, assault with a dangerous weapon.

That such testimony is not admissible is established by the following cases:

In *Brown vs. U. S.*, 152 Fed. (2) 138, (C.A.D.C.), the defendant was charged with an indecent assault on

a very young girl. One of the officers testified as to his belief as to what the defendant had done. The Court says at page 139:

> "Without objection, police officers told the jury what the child had said a day or two after the alleged assault and one of the officers expressed a belief as to what appellant had done. As the Municipal Court of Appeals said, the officers' testimony was plainly inadmissible. The admission of such testimony in so serious a case might be enough to require reversal despite the fact that counsel did not object."

Robertson vs. U. S., 171 Fed. (2d) 345, (C.A.D. C.). This involved a charge of forging and uttering a Government check. The victim testified that he observed the defendants after he had cashed the check and "I thought they were arguing over the divvy of the money." The Court says at page 346:

> "It should be noted that Nelligan did not say he saw the defendants divide the money. His testimony was that he saw Robertson pass money to the other man and 'thought they were arguing over the divvy of the money.' Incidentally it may be observed that the quoted part of this testimony, although not objected to, was clearly incompetent and inadmissible."
>
> * * * * *
>
> "However, we cannot escape the conclusion that in both instances the errors complained of were plain; that the natural and probable influence upon the jury was prejudicial, and that the right of appellant to a fair and impartial verdict of the jury was substantially affected. Under these cir-

cumstances we are convinced that we should apply Rule 52 (b) of the Federal Rules of Criminal Procedure and take notice of the errors, although they were not brought to the attention of the trial Court. Accordingly the judgment against appellant on the second count of the indictment is reversed."

Girson vs. U. S., 88 Fed. (2) 358 is a case from this court. The trial was upon a charge of concealing stolen government property. The pertinent part of the opinion is under Head Note 9 at page 361. The identity of certain socks alleged to have been stolen was in issue. The defendant attempted to ask a government witness whether certain socks shown the witness were the same as those in evidence. The trial court sustained an objection to this testimony and this court said concerning it at page 361:

> "The ruling of the trial court was correct. The admissibility of the evidence sought to be elicited is determined by the general rule as stated in 11 R.C.L. 565, Sec. 3: '* * * As to conclusions upon matters within the scope of common knowledge and experience, the jury is a tribunal well fitted to perform this task. To permit a witness to state to the jury his opinions as to the conclusions to be drawn from the concrete facts which he has observed would be to invade the peculiar province of the jury; and therefore conclusions of that character are universally excluded. * * *' "

See also this court's opinion in *D'Aquino vs. U. S.*, 192 Fed. (2d) 338, at page 371 under Head Note 61.

In connection with this assignment we expect it to be argued that the error in admitting this testimony

cannot avail the appellant because it was not objected to. It is true, there was no objection. However, it may be noted that when the same question was put to the witness Abernathy, i.e. whether he thought the gun was loaded, the defendant objected and the objection was overruled (Tr. 40).

This Court, though, will notice and consider plain and substantial error even though there was no objection at the trial. See *Robertson vs. U. S.* and *Brown vs. U. S., supra.*

In *Gross vs. U. S.*, 136 Fed. (2) 878 this court sua sponte took notice of the erroneous admission of a confession under the McNabb rule and reversed a conviction although there was no objection to the admission of the confession and no assignment of error upon that ground on the appeal. The Court says at page 880:

> "It is obvious that it is immaterial in a court of justice whether the court sua sponte first recognizes and calls attention to a plain error 'absolutely vital to defendants' and that appellant's counsel then urges it, or that counsel first calls the appellate court's attention to the vital error.
>
> We therefore consider it irrelevant that in the *McNabb* and *Anderson* cases the objection that the confessions were obtained by coercion was made at the trial."

Criminal Rule 52 (b) provides:

> "Plain errors or defects affecting substantial

rights may be noticed although they were not brought to the attention of the Court."

See also *Karrell vs. U. S.*, 181 Fed. (2) 981, 986, (C.A.9) (Head Note 9).

Freeman vs. U. S., 158 Fed. (2) 891, 895, (C.A.9) (Head Note 7).

Assignment of Error No. 3:

The Court erred in admitting over defendant's objection the testimony of Dr. James E. O'Malley concerning the caliber of the bullet which inflicted the wound in defendant's hand, on two grounds: (a) The witness was not qualified as a ballistics expert; (b) The testimony of the witness is not a statement of opinion.

We will first discuss the error indicated in sub (a).

The entire testimony of Dr. O'Malley pertinent to this issue is set forth verbatim at pages 7 and 8 supra.

It will be noted that the doctor did not qualify in any degree as an expert in the field of ballistics—that so far as the record shows he didn't know a 25 caliber from a shotgun. That so far as we or the trial court knew he had never handled a gun nor a cartridge nor a bullet.

It is true that the defendant's trial lawyer waived the doctor's qualifications, but the record (Tr. 46) shows patently that he was only admitting the doctor's

qualifications as a physician or surgeon. Surely the defendant should not be mouse-trapped in this manner. If the District Attorney intended to qualify the witness as an expert in ballistics he should have advised the defendant's attorney when he admitted the doctor's qualifications, obviously only in the realm of medicine.

It would seem only necessary to state the proposition that in the field of expert testimony a witness, by reason of his being a physician and surgeon only, does not qualify him to testify as an expert as to bullets and gun caliber. However, there are cases on the point as well.

In *Wise vs. State*, 11 Ala. App. 72; 66 Southern 128, the defendant was convicted of murder in the second degree. A doctor was examined in behalf of the defendant. The doctor hunted very little and had not had much experience with firearms. An objection to the following question was sustained: "Doctor, from an examination of the wound and the outer garment through which the load passed, how close, in your judgment, was the muzzle of the gun that fired that shot to the body of the deceased at the time of the shot?" In considering this ruling the Court said at page 131:

> "The mere fact that the witness Matheny was a physician did not necessarily, of itself, without more, and when it was not made to appear that he

had had experience, show him to be qualified as an expert to give his opinion on how close the gun was to the deceased when the shot that caused her death was fired, and the court committed no error in refusing to admit this evidence as competent expert opinion testimony. A witness, to testify as an expert, must first be shown to be such. 6 Mayf. Dig. 344, Sec. 180."

In respect to the testimony of another witness, who apparently was permitted to testify over objection of the defendant, the Court says at page 132:

"We hardly think the witness J. F. Johnson was shown to have sufficient knowledge on the subject to answer as an expert the hypothetical questions that he was permitted to answer against the objection of the defendant. His experience and observation seemed principally limited to the modern arms used in warfare, and he was shown to have had but little knowledge, if any, of a weapon like the one with which the deceased was killed—a short, single-barreled shotgun. His opinion must necessarily have been based upon a species of knowledge variant from the facts hypothesized, and consequently variant from that knowledge which the law requires as a qualification of one who gives his opinion as an expert."

In *Golson vs. State*, 26 Southern 975 (Ala.), a murder trial, a factual issue arose as to whether a gunshot which pierced a door was fired from the outside or from the inside. The clear necessity for a witness' qualifications as an expert in ballistics is pointed out by the Court at page 978:

"5. The door through which three shots were fired was exhibited to the jury. Middleton, qualify-

ing as an expert, testified that in his opinion the shots were fired from the outside. McDonald also, examined by the defendant, testified to facts showing he had no expert knowledge on the subject, and stated that he was not an expert. He was asked by defendant for his opinion, whether the person fired the shots through the door, stood on its outside or inside. In the rejection of this evidence, the court did well. The witness knew no more about the matter than the persons composing the jury, and no more than any other ordinary person, not skilled as to the matter inquired about."

Moline vs. New York Life Insurance Company, 148 Kan. 555; 83 Pac. (2) 639. This case was a suit upon the double indemnity provision of an insurance policy for the death by gunshot wound of the insured. With reference to the testimony of doctors the Court says at page 641 of the Pacific Reporter:

"Each of the doctors hereafter mentioned saw and examined the body of the insured. In addition to their medical testimony concerning the competency of which there is no dispute. Dr. Morgan and Dr. Hilbig testified with reference to their personal familiarity with shotguns, the size of a hole the discharge would make at varying distances, the spread of the charge, etc. Dr. Mays stated he was familiar with the operation of shotguns; that he had made no especial study of gun shot wounds or the effect thereof but that he had heard some discussions thereon at clinics and medical meetings; that he had practiced medicine for 26 years and had had occasion as a physician to examine and treat gun shot wounds and powder burns. Dr. Morgan and Dr. Mays were permitted to give their opinions as to the distance the gun was from the head at the time of the discharge."

* * * "The general rule is that the normal function of the witness is to state facts within his personal knowledge, and that ordinarily his opinions and conclusions are not to be received. See 22 C.J. 485, where many Kansas cases are cited. However, it is recognized that a skilled witness is permitted to state facts known to him because of his special knowledge and experience or his inferences therefrom where the matter involved is such that persons without his special knowledge could not observe intelligently or draw correct inferences, although admission of such evidence has been criticized."

See also *Franklin vs. Commonwealth*, 48 S.W. 986,

Dr. O'Malley, having shown no experience with or knowledge of guns or bullets, was wholly unqualified to express an opinion as to the caliber of the bullet which caused the wound observed by him in the defendant's hand.

We now consider sub (b) of this assignment, to-wit, *The testimony of Dr. O'Malley is not a statement of opinion.*

Because of the peculiar nature of this statement of the doctor it is repeated here:

"Q. Was it made—was it a gunshot wound?

A. If it please the Court, could I tell the circumstances under which I examined this man? This man was brought to me by the deputy marshall with no history and had me look at the hand and asked me what caused that wound, and I said a gunshot wound, probably a 25 caliber weapon."

This statement of the witness is in no sense a statement of his present opinion. It is no more than an assertion of what he told the deputy marshall on a prior occasion out of court and not under oath. The statement is not followed up to elicit whether or not it expressed his present opinion. He does not say "It is my opinion that it was a gunshot wound, probably a 25 caliber weapon," he merely says that is what he told the Marshall at a prior time. So far as its being testimony upon which the jury could base any conclusion or even inference, it has no probative value whatsoever. We make further reference to this testimony in our next Assignment of Error.

Assignment of Error No. 4:

The Court erred in submitting to the jury the charge of assault with a dangerous weapon since there is not sufficient evidence that the gun was loaded.

That a gun which is merely pointed at a victim must be loaded in order to be a dangerous weapon, there can be little argument. This Court has clearly enunciated the rule in *Price vs. U. S.*, 156 Fed. 950. This is an appeal from a conviction of assault with a dangerous weapon in the United States Court for China. The problem is well stated in the following excerpt from this Court's opinion appearing on page 952:

"2. The court found, and there is evidence to justify the finding, that the defendant at the time and place stated in the information, while engaged in an angry altercation with the complaining witness, without justification, and within shooting distance, drew a revolver and pointed it toward the witness in a threatening manner, putting him in such fear that he got under a table for safety. The court also found, and, indeed, the fact is undisputed, that the pistol was unloaded, but this was not known to the complaining witness. We think, upon the facts stated, the judgment of the court, convicting the defendant of the offense of an assault with a dangerous weapon, cannot be sustained. In order to constitute that offense, a dangerous weapon must be used in making the assault. The use of a dangerous weapon is what distinguishes the crime of an assault with a dangerous weapon from a simple assault. A dangerous weapon 'is one likely to produce death or great bodily injury.' *U. S. vs. Williams* (C.C.) 2 Fed. 64. Or perhaps it is more accurately described as a weapon which in the manner in which it is used or attempted to be used may endanger life or inflict great bodily harm. And it is perfectly clear that an unloaded pistol, when used in the manner shown by the evidence in this case, is not, in fact, a dangerous weapon. If the defendant had struck or attempted to strike with it, the question whether it was or was not a dangerous weapon in the manner used, or attempted to be used, would be one of fact; but the courts quite uniformly hold as a matter of law that an unloaded pistol, when there is no attempt to use it otherwise than by pointing it in a threatening manner at another, is not a dangerous weapon."

See also the *Annotation in 74 A. L. R. 1206.*

What evidence was there at this trial to establish that the gun was loaded? Each of the three witnesses who saw the assault testified they could not tell if the gun was loaded (Tr. 32, 35 and 40). The prosecution apparently sensed this deficit and therefore attempted to get in some evidence on this vital point through the witness Dr. O'Malley. Up to this point we have these facts: The defendant pulled and pointed a small revolver, apparently a 25 caliber, at the victim about 7 o'clock P. M. Four hours later he was arrested, at which time he had a wound in his right hand. Then we reach Dr. O'Malley's statement. Assuming that it was proper and that it had some probative weight, it could be inferred therefrom that the defendant's hand had been wounded by a gunshot of a 25 caliber. From that inference the prosecution's next step is to infer that the bullet which wounded his hand came from the same gun which he pointed at the bartender. The prosecution next infers that the gun which wounded the defendant's hand had not been loaded at some time between 7 o'clock and 12 o'clock P. M., and finally, therefore, that the gun was loaded at the time of the assault on Abernathy. What a strained link of circumstances and inferences!

We think the foregoing is a fair recital of all the evidence which the jury had with which it could conclude beyond a reasonable doubt that the gun was

loaded. It is doubtful if such testimony even reaches the dignity of being circumstantial evidence. At best it is inference upon inference at least four times removed.

Assignment of Error No. 5:

The Court erred in its instructions: (a) In failing to give defendant's requested instruction No. 1; (b) In failing to adequately instruct the jury as to the distinction between assault with a dangerous weapon and simple assault; (c) In failing to instruct on circumstantial evidence.

We will discuss (a) and (b) of this assignment together. Defendant's requested instruction No. 1 (Tr. 11) which the Court refused to give is as follows:

> "An unloaded gun is not a dangerous weapon when used only as a firearm. The pointing of an unloaded gun at the prosecuting witness, accompanied by a threat, without any attempt to use it otherwise, is not an assault with a dangerous weapon, and cannot sustain a conviction for such an assault for want of present ability to commit a violent injury on the person threatened in the manner attempted, and this, too, regardless of whether the party holding the gun thought it was loaded, or whether the party at whom it was menacingly pointed was thereby placed in great fear."

Instructions Nos. 1, 2 and 3 of the Court's charge are the only ones in the entire charge which purport to tell the jury the elements of the crime charged and the included offense of simple assault or to distinguish between them. These instructions are as follows:

No. 1

"The indictment in this case charges the defendant with the crime of assault with a dangerous weapon, alleged to have been committed on or about July 16, 1952, near Anchorage, upon Paul Abernathy, by pointing a gun at him and threatening him with bodily harm.

The law of Alaska defines the crime charged as follows:

'That whoever being armed with a dangerous weapon shall assault another with such weapon shall be punished.'

An assault with a dangerous weapon is an unlawful offer, coupled with present ability, to injure another with such weapon. Any pointing of a loaded gun at or toward another in a menacing and threatening manner is sufficient to constitute an assault with a dangerous weapon.

In this connection, you are instructed that a loaded revolver is a dangerous weapon. Whether it was loaded at the time charged may be inferred from the surrounding facts and circumstances, but whether the facts and circumstances proved are such as to warrant such an inference, is for you to say."

No. 2

"The essential elements of the crime charged, each of which must be proved beyond a reasonable doubt before the defendant may be convicted, are:

(1) An assault, and

(2) With a dangerous weapon

It is undisputed that the crime, if committed, was committed at or about the time and place charged. Therefore, if you find from the evidence beyond a reasonable doubt that at or about the time and place charged, the defendant made an assault with a loaded revolver upon Paul Abernathy by pointing it at or toward the said Abernathy in a threatening or menacing manner, you should find him guilty. But if you do not so find or have a reasonable doubt thereof, you should acquit him."

No. 3

"Included in the crime charged in the indictment is the crime of simple assault.

Simple assault is defined as:

'Whoever, not being armed with a dangerous weapon, unlawfully assaults or threatens another in a menacing manner, shall be punished.'

Therefore, if you find that the revolver was not loaded but do find from the evidence beyond a reasonable doubt that the defendant unlawfully or in a threatening or menacing manner, pointed said revolver at or toward the said Abernathy and that the said Abernathy did not know that it was not loaded and was thereby put in fear and apprehension of injury, you should find the defendant guilty. But if you do not so find or have a reasonable doubt thereof, you should acquit him.

You are also instructed that if you find that an assault was committed but are in doubt whether it was an assault with a dangerous weapon or merely simple assault, you should convict the defendant of the lower grade of offense, that of simple assault." (Tr. 12 to 14).

The defendant excepted to the failure of the Court to give his requested instruction No. 1 and to the in-

adequacy of the court's charge on this point, in the following language: (Tr. 62).

> "MR. McCUTCHEON: The defendant excepts to the failure of the Court to include Defendant's Instructions 1 and 2, contend that it is in the [isn't] clear with the Court's instructions as given. An unloaded gun is not a dangerous weapon within the meaning of the statute in the light of the testimony given."

We think the instruction requested by the defendant, as set out above, is an excellent statement of the law as announced in the *Price* case *supra;* that it is clear and concise and in language that would mean something to the jury. We recognize, however, that if the Court's charge adequately covered the same matter, that the Court had the right to choose between its own language and that submitted by the defendant. We think, however, it is apparent that the Court's three instructions are not adequate, are confusing and misleading and inconsistent. If that be so, the defendant was entitled to an instruction as proposed by him, or at least one substantially in that language.

Defects in the Court's instructions are several. In No. 1 the last paragraph advises the jury that a loaded gun is a dangerous weapon. It does not, however, advise them that if it is not loaded it is not a dangerous weapon. In fact, nowhere in these instructions is the jury told, except by vague indirection, that if the gun

was unloaded there could be no crime of assault with a dangerous weapon. The nearest the Court comes to making this clear is in the following language from its Instruction No. 3:

> "Therefore, if you find that the revolver was not loaded but do find from the evidence beyond a reasonable doubt that the defendant unlawfully or in a threatening or menacing manner, pointed said revolver at or toward the said Abernathy and that said Abernathy did not know that it was not loaded and was thereby put in fear and apprehension of injury, *you should find the defendant guilty. But if you do not so find or have a reasonable doubt thereof, you should acquit him.*"

We have italicized the last few words of this quoted part to point out the confusion in this instruction. Of what should the jury find the defendant guilty, assault with a dangerous weapon or simple assault? The first portion of the quoted part implies that the jury must find *affirmatively* that the revolver was not loaded. The real test of course is whether or not they were convinced beyond a reasonable doubt that it was loaded. The effect of this unfortunate language is to shift the burden from the Government to the defendant on the vital issue as to whether or not the gun was in fact loaded.

Sub-division (c) of this Assignment of Error raises the issue of the Court's failure to instruct on circumstantial evidence. The Court failed to give any instruc-

tion on circumstantial evidence (Tr. 12 to 22). It is true that no request for such an instruction was made. However, on a matter as vital as was this, the Court will consider such error even in the absence of a request.

This Court said so in *Samuel vs. U. S.*, 169 Fed. (2) 787, at 792 in this language:

> "In a criminal case the Court must instruct on all essential questions of law involved, whether or not it is requested to do so. (Citing case)"

The same rule is announced by this Court in *Morris vs. U. S.*, 156 Fed. (2) 525, at page 527 as follows:

> "It is our opinion that the Trial Court committed fatal error in failing to instruct the jury on the statutes and regulations defining and governing the offenses charged against the appellant. No assignment of error was made at the trial covering this claimed error, but we consider it because, as is well stated in *Subay vs. United States*, 10 Cir., 1938, 95 F.2d 890. 893, '* * * Where life or liberty is involved, an appellate court may notice a serious error which is plainly prejudicial even though it was not called to the attention of the Trial Court in any form.' In a criminal case, it is always a duty of the Court to instruct on all essential questions of law, whether requested or not. (Citing cases)."

Was an instruction on circumstantial evidence essential in this case? We think it is, obviously. We emphasize this error because the most vital element in the case was whether or not the gun was loaded. In

other words, whether or not the defendant was guilty of the aggravated assault or the lesser, included crime of simple assault. The determination of that issue depended entirely upon circumstantial evidence—giving the prosecution the benefit of the most favorable consideration of all the evidence. There was no direct evidence that the gun was loaded. The only circumstantial evidence on that point was the testimony of Dr. O'Malley. (We do not concede of course that his testimony was in any way properly admitted, but if it were, at most, it was circumstantial, and very thin at that.)

So the case was submitted to the jury without any instruction or guide as to how it may or could consider and analyze circumstantial evidence. We believe it strains all reason to conclude that from the doctor's testimony the jury could infer circumstantially that the gun was loaded when the assault was committed. Was this testimony consistent with the other testimony? Was it consistent with every reasonable hypothesis of guilt? Was it inconsistent with every reasonable hypothesis of innocence? Perhaps a jury could have answered each of these questions affirmatively, but at least it should have been advised that it must do so in order to resolve the circumstances in favor of a conclusion that the gun was loaded. Without such advice the jury had no device by which to measure

those circumstances and was left entirely to its own conjecture and speculation.

CONCLUSION

From the foregoing, we think it is demonstrated that by a series of errors, i.e.:

1. The admission of testimony of witnesses that they *thought* the gun was loaded;

2. The admission of Dr. O'Malley's testimony;

3. The refusal to give the defendant's requested instruction;

4. The Court's failure to adequately instruct on the distinction between assault with a dangerous weapon and simple assault;

5. The Court's failure to instruct on circumstantial evidence; and

6. The Court's failure to withdraw from the jury the crime charged, for lack of evidence;

all bearing heavily on the only crucial issue in the case, the result was an unfair trial prejudicial to defendant.

Respectfully submitted,

HENDERSON, CARNAHAN, THOMPSON & GORDON
HARRY SAGER,

Attorneys for Appellant.

No. 13,934

IN THE

United States Court of Appeals

For the Ninth Circuit

DON MAURICE RANDALL,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court for the Territory of Alaska, Third Division.

BRIEF FOR APPELLEE.

WILLIAM T. PLUMMER,
United States Attorney,
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JURISDICTION.

The statement set forth in appellant's brief relative to jurisdiction is correct.

STATEMENT OF THE CASE.

The statement of the case as set forth by appellant while dealing primarily with facts most advantageous to appellant's position is, for the most part, accurate and correct.

It should be pointed out, however, that David E. Thompson testified that defendant and the blonde woman were engaged in an argument (TR 30); that defendant tried to force the woman to take a double shot (TR 30); that they then went outside and argued; that she came back in crying and said, "Just leave me alone." (TR 30); that when the defendant pulled the gun on the bartender, the bartender put up his hands and served the drink (TR 31).

STATEMENT OF POINTS RELIED ON.

1. The Court did not abuse its discretion in denying defendant's motion for a continuance.

2. The Court did not err in admitting the testimony of the witnesses David E. Thompson and Patricia Ann Herrick that they thought the gun was loaded.

3. The Court did not err in admitting the testimony of Dr. James E. O'Malley.

4. The Court did not err in submitting to the jury the charge of assault with a dangerous weapon.

5. The Court did not err by failing to instruct on circumstantial evidence or by failing to give defendant's requested instruction number 1.

ARGUMENT.

POINT ONE.

THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR A TRIAL CONTINUANCE.

The trial court heard arguments on the two written motions for continuance filed by defendant. Although the transcript of those two arguments is not before this Court, the minute orders denying the motions are a part of the record (TR 7, 10, and 11). Both motions were denied by the trial Court on the ground that the affidavits were insufficient. The statements of defendant's doctors that the defendant developed a "tendency toward forgetfullness" (TR 6) or that the defendant "complained of marked nervousness, anxiety and apprehension" (TR 8) might well apply to any person faced with the possibility of standing trial on a criminal charge. The trial Court had an opportunity to observe the defendant on the morning the trial began and at that time denied the motion. The cases cited by appellant correctly state the law and the Appellate Court did not reverse in any one of the cases for an abuse of discretion. The controversion of the showing that defendant was not prepared to go to trial must have been made at the hearings on the motions. There has been no showing of an abuse of the discretion vested in the Trial Court.

POINT TWO.

THE COURT DID NOT ERR IN ADMITTING THE TESTIMONY OF THE WITNESSES DAVID E. THOMPSON AND PATRICIA ANN HERRICK THAT THEY THOUGHT THE GUN WAS LOADED.

Appellant points out that the witnesses Thompson and Herrick were permitted to testify that they thought the gun was loaded. It should first be observed that no objection was made to this testimony. Rule 51, Federal Rules of Criminal Procedure, 18 U.S.C.A. provides in part as follows:

> "* * * for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the Court is made or sought, makes known to the Court the action which he desires the Court to take or his objection to the action of the Court and the grounds therefor; * * *"

The defendant completely failed to make any objection to the above testimony and cannot now urge that his conviction be reversed unless it is made to appear that the admission of the evidence was an error of such magnitude as to deprive defendant of substantial justice. Law v. U.S., (5th) (Cir.) 1949; 177 F 2d 283. No substantial error exists in this case since the jury had ample evidence before it from which the inference could be drawn that the gun was loaded. That evidence will be considered in detail in assignment of error number four.

Appellant, perhaps in endeavoring to explain his failure to object to the above questions when put to

the witnesses Thompson and Herrick, states that the same question was put to the witness Abernathy, and that the defendant's objection was overruled. It should also be noted, however, that the witnesses Thompson and Herrick testified before Abernathy, and that the objection was first urged when the third witness was testifying. In addition, the objection made to the question asked of Mr. Abernathy was "that it was an improper question." General objections of that type cannot avail the objector on appeal. Wigmore, Vol. 1, Section 18, Page 332.

The nebulous differences in the decisions resulting from the efforts of the Courts to adequately distinguish between opinion evidence and fact evidence are discussed in Wigmore on Evidence, Third Edition, Vol. VII, Sections 1917-1929. If the witnesses had been asked, "was the gun loaded?", they would have been permitted to answer, as they did in response to the question asked, with all of the facts they had observed. Those facts are (1) that the weapon had been concealed (2) that the clip was in and ready for action (3) the circumstances surrounding the way in which defendant used the gun. The appellant is therefore urging that the form of the question which was asked without objection from the defendant, is such a substantial error that reversal should follow.

The quoted passage relied on by appellant in the case of Brown v. U. S. (C.A.D.C.), 152 F 2d, 138 was not at all essential to the Court's decision and the Court so stated in the following sentence.

The question asked of the witnesses Herrick, Thompson, and Abernathy, was simply, "Was the gun loaded?" The question of whether the gun was loaded is a fact about which the witnesses could testify if they had knowledge. The witnesses testified that the gun was loaded. On cross-examination, defense counsel showed that the witnesses did not have any knowledge on that point. No substantial or prejudicial error resulted from the above question since defendant did not object. If the objection to the question put to Abernathy should have been sustained, there was still sufficient evidence for the case to be submitted to the jury, and there was no prejudicial error.

POINT THREE.

COURT DID NOT ERR IN ADMITTING THE TESTIMONY OF DR. O'MALLEY.

Dr. O'Malley was not testifying as a ballistics expert. He testified that the wound was a gunshot wound rather than a wound received from the tailgate of a truck. He testified that the wound was caused by a pistol of either .25 caliber or approximately .25 caliber. That testimony is not that of a ballistics expert but that of a doctor. A doctor could testify that the wound, from his experience, was caused by a gunshot. His qualifications to testify as an expert as to medical facts were waived by the defendant.

The practical and sensible test for receiving opinion testimony is discussed in Wigmore on Evidence, Vol. 7, Section 1923, page 21:

> "But the only true criterion is: On this subject can a jury draw from this person appreciable help. In other words, the test is a relative one, depending on the particular subject and the particular witness with reference to that subject, and is not fixed or limited to any class of persons acting professionally."

The cases cited by appellant represent the subtleties and refinements of the Opinion rule, which are legion. The short answer is that Dr. O'Malley testified originally only as to the fact that the wound was caused by a gun. The subsequent testimony that it was a .25 caliber gun which caused the wound was volunteered by the witness and appellant made no motion to strike the testimony, and therefore cannot complain on appeal, that the testimony should have been excluded.

POINT FOUR.

COURT DID NOT ERR IN SUBMITTING TO JURY THE CHARGE OF ASSAULT WITH A DEADLY WEAPON SINCE THERE IS NOT SUFFICIENT EVIDENCE THAT THE GUN WAS LOADED.

The argument of appellant that the case should not have been submitted to the jury overlooks the fact that defendant failed to make a motion for judgment of acquittal before the case was submitted to the jury, as provided in Rule 29, Federal Rules of Criminal Procedure, Title 18 U.S.C.A. The sufficiency of the evidence to sustain conviction is not reviewable on appeal where no motion for a directed verdict was made in the District Court. That principle has long been established law.

As stated by the Court in *Colt v. U. S.,* 160 F. 2d 650 (C.A. 5th):

> "In the conspiracy case no motion for a directed verdict was made in the lower court, and therefore, the sufficiency of the evidence is not here reviewable under the well established rule which defendant's present counsel candidly recognizes."

See also *Cratty v. U. S.,* 163 F. 2d 844, headnote 9, where the Court states that where defendant did not make a motion for directed verdict, he was precluded from complaining that the trial Court erred in failing to direct a verdict in his favor.

The law in Alaska has been, since 1900, that the question as to whether the gun was loaded is a question for the jury. We shall quote at length from the well-reasoned opinion of Justice Hawley of this Court in the case of *Jackson v. U. S.,* 102 F. 473 at page 485 (emphasis supplied):

> "The remaining point, that there was no evidence that the revolver was loaded is equally without merit. *It is true that there was no positive or direct evidence that it was loaded. How could there be? It was not discharged. Jackson kept possession of it,* and got away as speedily as possible after Smith was shot. Whether it was loaded or not was a question of fact, to be determined by the jury. The testimony was circumstantial. *The jury had to infer the fact from all the testimony and the surrounding circumstances. What was the object or purpose of Smith and his associates* in going down to the wharf? *What was*

> *the natural inference to be drawn from the acts and conduct of Jackson* at or about the time he drew and pointed his gun at Tanner? *The jury heard this testimony, and were authorized to draw the inference therefrom* that Jackson's revolver was loaded."

Similar reasoned decisions are found in *Territory v. Gomez* (S.C. Ariz.) 125 P. 702; *People v. Montgomery* (S.C. Calif.) 114 P. 792, and other cases. See annotation 74 A.L.R. 1206.

The jury in this case must have found that the gun was loaded. There was sufficient circumstantial evidence from which that inference could be drawn: the fact that the weapon had been concealed; the fact that defendant said, "Are you going to give her a drink, or do I have to whip you?"; the fact that defendant had been drinking quite a bit and was mad; the fact that defendant whipped out a gun and threatened the bartender; the fact that the clip was in the gun. The jury had an opportunity to observe the witnesses and the defendant, even though he did not testify.

As the Court stated in the *Jackson* case, supra, how could there be direct evidence that the gun was loaded if the government failed to get the gun immediately after the assault?

One further point should be mentioned and is urged only to show the illogicalness of the theory that the government must show that the gun could have been fired. The doctrine becomes rather far-fetched

if the government must prove (1) that the cartridge in the chamber at the time of the threat had an ignitable primer, (2) that the powder was dry, (3) that the gun was not in a faulty mechanical condition, (4) that the barrel was not plugged, etc. We contend that a gun is inherently dangerous and that the burden of showing that the gun was unloaded should rest on the defendant because those facts are within his peculiar knowledge, especially where the gun is not recovered, which is the case here.

POINT FIVE.

THE COURT DID NOT ERR IN ITS INSTRUCTIONS.

The Court correctly stated the law of Alaska as set out in the *Jackson* case, supra. Instruction No. 1 states that the question as to "Whether it (the gun) was loaded at the time charged may be inferred from the surrounding facts and circumstances, but whether the facts and circumstances proved are such as to warrant such an inference, is for you to say." Defendant's requested Instruction No. 1 conveys the impression that the government must prove that the gun was in fact loaded, which is not the law.

The Court's first three instructions are not confusing, misleading, and inconsistent as urged by appellant. They are in fact simple and concise, and cover the law applicable to the case.

The appellant insists that the instruction number three is misleading, since it is urged the Court didn't

make it clear whether simple assault or assault with a dangerous weapon was being discussed. The whole instruction is obviously devoted to simple assault and is perfectly clear.

The appellant urges that the Court erred in failing to instruct on circumstantial evidence, although appellant admits that no such instruction was requested. A brief reference to Rule 30, Federal Rules of Criminal Procedure, Title 18, U.S.C.A., which states that "no party may assign as error any portion of the charge—unless he objects thereto," should suffice to overcome appellant's contention. However, the two cases cited by appellant, *Samuel* and *Morris* cases, are clearly distinguishable. In those two cases the essence of the charge was a violation of a regulation, which had to be brought to the attention of the jury. See *Todorow v. U. S.* (Cir. 9) 173 F 2d 439.

In addition, the trial Court stated in the quoted portion of instruction number 1 above, that the jury could infer that the gun was loaded from all the surrounding facts and circumstances. No instruction on circumstantial evidence was warranted since defendant failed to request one.

CONCLUSION.

None of the matters complained of by appellant in the trial of this case constituted error; if it could be so construed certainly they did not constitute prejudicial error.

An examination of all the testimony when reduced to its simple factor will reveal that the only question was whether defendant made the assault and if the jury could infer from all the facts and circumstances that the gun was loaded. In this respect the jury having heard all the evidence, decided against the appellant. The verdict of the jury should not be set aside.

Dated, Anchorage, Alaska,
March 31, 1954.

Respectfully submitted,

WILLIAM T. PLUMMER,
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No. 13934

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DON MAURICE RANDALL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA, THIRD DIVISION

HONORABLE GEORGE W. FOLTA, *District Judge.*

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REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA, THIRD DIVISION

HONORABLE GEORGE W. FOLTA, *District Judge.*

The Government's brief states (page 1) that the recital of the evidence in our opening brief was substantially accurate. From there, however, the brief so distorts and mis-states the evidence that we feel it encumbent upon us to reply. We do this lest the Court, from a reading of the Government's brief may get the impression that the evidence therein related is in accordance with the record.

Assignment of Error No. 2:

This assignment raises the question of admission of testimony of certain witnesses, that they *thought* the gun was loaded. It is discussed by the appellee on pages 4, 5 and 6 of its brief.

On page 6 of its brief the Government states "the question asked of the witnesses Herrick, Thompson and Abernathy, was simply, 'was the gun loaded?' " The record shows to the contrary, that the questions asked by the District Attorney of each of these witnesses was "*do you think the gun was loaded*" (Tr. 31, as to Thompson; 34 as to Herrick; 40 as to Abernathy).

The Government also states on page 6, "the question of whether the gun was loaded is a fact about which the witnesses could testify *if they had knowledge.*" (Emphasis ours). On cross examination each of these witnesses testified that they could not tell if the gun was loaded. In other words, they had no knowledge of the fact, as to whether the gun was loaded. (Tr. 32 as to Thompson; 35 as to Herrick; 40 as to Abernathy). It is obvious that at the trial the District Attorney realized that the witnesses had no actual knowledge of this fact. He therefore deliberately asked them not what they knew but what they *thought.*

As we anticipated, the Government relies heavily upon the fact that no objection was taken to this particular testimony of these witnesses. In that connection and on page 5 of appellee's brief, they criticize our exerpt from the case of *Brown vs. U. S.*, 152 Fed. 2d. 138 (CADC), stating that that language was not necessary to the opinion of the Court. However, we direct the Court's attention to the concurring opinion of Judge Stephens of this court, sitting by special assignment in the District of Columbia, appearing on page 140 of the Report. Judge Stephens expresses the view that the reversal in the *Brown* case should better have been founded upon the testimony of the police officers, to which there was no objection at the trial, than upon the testimony of another witness to which objection was taken.

Assignment of Error No. 3:

This assignment has to do with the testimony of Dr. O'Malley. The Government discusses this point in about one page (Pages 6 and 7). They have crowded into that brief space a most amazing set of mental gyrations.

The Government's brief says, "Dr. O'Malley was not testifying as a ballistics expert. He testified that the wound was caused by a pistol of 25 caliber." If the caliber—the size—of a bullet is not within the realm of

the science of ballistics, we should like to be advised into what field of training it belongs.

The Government argues that this testimony re caliber is not in the field of ballistics, but in the field of training of a doctor. This, they argue, despite the several cases cited in our opening brief which hold clearly that a doctor has no business expressing an opinion as to ballistics unless he shows some special training in that field in addition to and independent of his medical training.

The Government's brief says "a doctor could testify that the wound, from his experience, was caused by a gunshot." Granted. If the purpose of this testimony was to show merely that the wound was a gunshot wound, then it obviously was wholly irrelevant to the issues before the court. In this event the objection made by the defendant (Tr. 46) was well taken and should have been sustained. That this was not the purpose of the testimony is clearly shown by the record immediately following the defendant's objection, (Tr. 47) as follows:

> "The Court: For the purpose of showing the caliber or approximate caliber of the bullet which caused the wound, the objection is overruled.
>
> Mr. Buckalew: That's the purpose of it, your Honor.
>
> The Court: Go ahead."

Despite the United States' attorney's assertion, at the trial, that the purpose of this testimony was to show caliber, the Government's attorneys now state (Appellee's Brief 7): "Subsequent testimony that it was a 25 caliber gun which caused the wound was volunteered * * *".

On this point Government counsel quotes from Wigmore to the following effect, "But the only true criterion is: On this subject can a jury draw from this person appreciable help? * * *" We think this excerpt points up the seriousness of the error in admitting this testimony from the doctor. The Court permitted a doctor to express an opinion upon a subject upon which he had no prior knowledge or qualification. His opinion was at least no better than that of any of the jurors. If the jurors were typical Alaskans, we anticipate the doctor's opinion was of far less value than their own.

Assignments of Error Nos. 4 and 5:

Our Assignment of Error No. 4 is to the effect that there was not sufficient evidence to submit to the jury on the question of whether the gun was loaded. Our Assignment of Error No. 5 raises the question of the sufficiency of the instructions given with respect to this same issue.

We shall discuss the appellee's brief on these two points together. There seems to run through the Government's discussion of these two points, a strange new concept of law, i.e., that when the Government runs into difficulty proving an essential element of a charge, that the burden then shifts to the defendant to disprove that element.

To illustrate, we quote the following excerpts from appellee's brief:

> "How could there be direct evidence that the gun was loaded if the government failed to get the gun immediately after the assault?" (page 9)

> "We contend that a gun is inherently dangerous and that the burden of showing that the gun was unloaded should rest on the defendant because those facts are within his peculiar knowledge, especially where the gun is not recovered, which is the case here." (page 10).

> "Defendant's requested Instruction No. 1 conveys the impression that the government must prove that the gun was in fact loaded, which is not the law." (page 10).

Unless we grossly misinterpret this language, it is apparent that the Government is now urging that on a charge for "an assault with a dangerous weapon" the Government is not obliged to prove that the weapon was in fact dangerous. What are the essential elements of this crime? Well, the trial Court in its instruction No. 2 (Tr. 13) says they are (1) an assault, and (2)

with a dangerous weapon. The Government now urges that it does not have to prove this second element. In other words, it says that it makes a case when it has proved an assault. Of course, this reasoning gets us to the ridiculous point where there is no distinction between a simple assault and one with a dangerous or deadly weapon.

The *Price case*, 156 Fed. 950, cited in our brief at page 21, holds clearly that an unloaded gun cannot be the vehicle for an assault with a dangerous weapon, unless of course it is used as a club or bludgeon.

The case of *Jackson vs. U. S.*, 102 Fed. 473, cited by the appellee, does not hold otherwise. Its only effect is that the jury could determine whether the gun was in fact loaded from all the surrounding facts and circumstances in that particular case. In fact we do not understand that the appellee is now contending that the use of a dangerous weapon is not one of the elements of the crime here charged. What they are asserting is that the Government need not prove that element, that the burden is upon the defendant to disprove it. We have thought that under our system of criminal jurisprudence, it was elemental that the burden was upon the prosecution to prove beyond a reasonable doubt by some type of evidence, direct, circumstantial or otherwise, each of the material allegations of the

charge. We have heard of no recent change in this fundamental rule, until seeing it asserted in the Government's brief.

In our opening brief we urged, under point 4, that the evidence as to whether the gun was loaded, was insufficient to take to the jury the charge of assault with a dangerous weapon, and under point 5 that the Court's instructions on the distinction between the two crimes being dependent upon whether the gun was loaded or not, were deficient. May we suggest now that the Government's present position, that it need not prove the gun was loaded, is a tacit admission that the position we there take is sound.

Under our Assignment of Error No. 5 we urged that the trial Court erred in failing to instruct on circumstantial evidence, even though the defendant made no request for such instruction. We cited cases to the effect that the Court is required to instruct on all essential principles of law, even though no request for such instruction is made.

On page 11 of the appellee's brief it refers to *Todorow vs. U. S.*, 173 Fed. 2nd 439, a case from this court. We have examined the *Todorow* case and it appears to us that the only pertinent language therein is the following from page 445:

"They cite cases, which have applied the general rule that in a criminal case, the Court must instruct the jury on all applicable law involved, whether or not he is requested to do so. The rule does not go beyond the requirement that the Court instruct on the principles of law which the jury should have in order to decide the factual issues presented."

The only important factual issue in our case, was whether the gun was loaded. The only evidence on that point, if any, was circumstantial. To paraphrase the language of the *Todorow* case, should not the Court have instructed on the principles of law with respect to the evaluation of circumstantial evidence, so that the jury could decide the factual issue presented, to-wit, was the gun loaded?

We again urge that the series of errors committed in the trial of this cause warrant a reversal.

Respectfully submitted,

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Attorneys for Appellant.

No. 13935

IN THE

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Respondent-Appellee.

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SOUTHERN DIVISION

HONORABLE OLIVER J. CARTER, *Judge*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE OLIVER J. CARTER, *Judge*

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Appellant was convicted upon a plea of not guilty in the United States District Court for the Northern District of California, at Sacramento, sitting without a jury, of the crime of forging and uttering a United States Treasury check, in the amount of $44.40 in violation of Title 18, U.S.C.A. 495 (R. 5), and sentenced on September 19, 1952 to concurrent sentences

of two years imprisonment on each of the two counts contained in the indictment.

Thereafter he was received on October 16, 1952, at McNeil Island, with minimum expiration date of his sentence computed as April 27, 1954, and full term expiration date September 18, 1954.

Under date of May 18, 1953, appellant filed his Motion to Vacate Sentence with the Trial Court, and the same was denied. (R. 13.) Thereafter, appellant sought to appeal in forma pauperis, and the Trial Court certified that in the Court's opinion the appeal was not taken in good faith. (R. 12.)

On January 30, 1953 and February 10, 1953, the appellant filed his petitions for writ of habeas corpus in the Court below in Causes 1689 and 1691, respectively (R. 3 and 6), which because of no substantial difference were considered together at the hearing before the Court June 3, 1953 (R. 14) at which time the body of appellant was produced in court and he filed his written traverse (R. 10-11) to appellee's motion to dismiss. (R. 8-9.)

On June 4, 1953, the Court having taken the matter under advisement, made and entered an order denying both of appellant's petitions for writ of habeas corpus, and dismissing the several actions.

(R. 15-17.) From that final order, the appellant has been permitted to appeal in forma pauperis. (R. 18.)

QUESTIONS PRESENTED

Does either of appellant's petitions for writ of habeas corpus allege grounds for relief?

ARGUMENT AND AUTHORITIES

The Court below determined that appellant's several petitions were without merit, and the errors assigned were matters which should have been corrected, if correction was necessary, upon appeal, and the writ of habeas corpus could not be used as a substitute therefor. (R. 16.)

In connection with its determination, the Court cited on the issue of merit the case of *Buckner v. Hudspeth*, 105 F. (2d) 393, and on the issue of review, *Adams v. U. S. ex rel McCann*, 317 U.S. 269.

Aside from accepting the District Court's evaluation of the grounds for relief alleged in the petitions from the standpoint of merit within the scope of habeas corpus, the appellee is moved to re-assert in this Court the grounds of its motions to dismiss the petitions.

Under the terms and provisions of Title 28, U.S.C., Section 2255, relating to habeas corpus pro-

ceedings, the appellant was entitled to move the trial court that imposed the sentence, if subject to collateral attack, to vacate, set aside or correct the same *at any time* (italics ours) such section providing:

> *"An application for a Writ of Habeas Corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears* that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or *that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."*
> (Italics ours.)

It has been finally determined by the courts that the grounds for a motion to vacate, set aside or correct the sentence, and by which appellant has heretofore applied for relief to the sentencing court under said Section 2255, encompass all of the grounds that might be set up in an application for a writ of habeas corpus predicated on facts that existed, as here, at or prior to the time of the imposition of sentence, and such procedure by motion is not in any wise to be taken as preliminary to an application for such writ.

> *Barrett v. Hunter*, 180, F. (2d) 510;
> *United States v. Hayman*, 342 U.S. 205;
> *Jones v. Squier*, 195 F. (2d) 179;
> *Winhoven v. Swope*, 195 F. (2d) 181.

It is the contention, therefore, of the appellee, that the appellant has failed to allege or show in his

applications for a writ of habeas corpus that he has brought his actions, or either of them, within the terms of the statute, and that such jurisdiction is not to be presumed, since it is the appellant's burden to show affirmatively that the Court has jurisdiction to entertain his petitions.

See *Gorman v. Washington University*, 316 U.S. 98.

CONCLUSION

In view of the foregoing, the dismissal of both petitions should be affirmed.

Respectfully submitted,

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Of Counsel

No. 13938

United States Court of Appeals

For the Ninth Circuit

JACK KALPAKOFF,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Appellant's Opening Brief

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For the Ninth Circuit

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Appellant's Opening Brief

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction of the appellant by the District Court of the Southern District of California.

This court has jurisdiction under the provisions of 28 United States Code, Sections 1291 and 1294 (1).

STATEMENT OF THE CASE

Appellant was indicted on November 19, 1952 under U. S. C., Title 50, App. Sec. 462—Universal Military Training Service Act, for refusing to report for induction [A. 3].[1]

[1]All references to the Transcript of Record are designated by pages of it, as follows: [R. 3]. A photocopy of the entire Selective Service File of Appellant was entered in evidence as Government's Exhibit 1-A. The file is not part of the Transcript of Record but is before the court. All references to the file are designated as pages of Exhibit 1-A, as follows: [Ex. p. 3]; the pagination of Exhibit 1-A is by a one-quarter inch high pencilled number, circled, and ordinarily is found at the bottom of each sheet of the Exhibit.

Appellant was convicted by Judge William C. Mathes on March 26, 1953 [R. 26]; he was sentenced by said judge to a 4-year term of imprisonment on April 7, 1953. [R. 4-6].

In the court below as well as before the Selective Service agencies, appellant claimed to be a conscientious objector to all participation in military activities and he was entitled to a classification as such, to-wit: I-0. He also claimed to be entitled to a II-A classification, on the basis of his farm work.

In his Classification Questionnaire appellant set forth the facts of his farm work. [Ex. p. 8]. Subsequently other material was added to show that he met the standard set up by the selective service regulations for the II-A agricultural classification. [Ex. pp. 13-14 (1948), 15-16 (1950), 58-59, 68-70, 73].

As is to be seen by the Minutes of Action by Local Board and Appeal Board [Ex. p. 11] he was classified I-A on November 4, 1948. He made a timely, written appeal for the farm work classification; on October 5, 1950, he was reclassified to the III-A classification. Class III-A is for a registrant with dependents [his father needed his services on the farm] and since it has the equivalent, deferment-effect of a II-A agricultural classification appellant took no appeal.

On March 26, 1951, appellant visited the office of the local board. Although he was in the III-A deferred classification he asked for and was given SSS Form No. 150, Special Form for Conscientious Objectors.

[Ex. 19]. He completed and filed this form on March 30, 1951. [Ex. pp. 20-23].

In his Special Form for Conscientious Objectors he set forth the details requested concerning his religious training and his religious belief. Subsequently many letters from ministers and elders of the Molokan community were added; petitions bearing signatures of members of the Molokan congregation were also placed in the file.

The board considered his claim for a conscientious objector's classification on April 5, 1951, and decided against giving him either one of the two such classifications, I-O or I-A-O. Nevertheless, on said date it reclassified him into Class I-A, although it possessed no new evidence reflecting in any way on his status as a registrant entitled to a III-A classification nor on his concurrent claim for a II-A classification.

Appellant filed a timely written appeal but the Appeal Board gave him no relief.

During the trial appellant complained that there was a failure of proof in that the Order to Report for Induction was invalid because the evidence demonstrated it was unexecuted, [R. 11]; that the purported Order to Report was otherwise invalid first, because the classification of I-A was arbitrary and without basis in fact [R. 10]; second, because he was denied due process of law in connection with the hearing before the Hearing Officer of the Department of Justice; and finally that the court erred in refusing him the

opportunity, during the trial, to inspect and use the F.B.I. investigative reports.

I.

THERE WAS NO PROOF THAT A VALID ORDER TO REPORT FOR INDUCTION HAD BEEN ISSUED.

Appellant was indicted for failure to *report* for induction [R. 3). The usual conscientious objector prosecution is based on an indictment for failure to *submit to* induction. Thus, in *Kent. v. United States,* 207 F. 2d 234, this court dealt with an appellant who complained that the order to report had been executed by an unauthorized person. The court pointed out that appellant responded to the order and did not place his refusal to be inducted on the ground of an improper signature. [236].

The instant appellant did not report. Whether he recognized the infirmity of the order is immaterial; he didn't obey it. He believes he is in a position to challenge it, whereas appellant in the *Kent* case, *supra,* was not.

It was pointed out to the trial court [R. 11] that there was no evidence that the Order to Report for Induction was signed, page 51 of the exhibit being a photocopy of the Order, and the only proof offered. Section 1632.1 of the Selective Service Regulations (32 C.F.R. §1632.1) is as follows:

QUESTIONS PRESENTED

1. When a selectee is ordered to report for and submit to induction and is thereafter indicted and tried for failure to *report* for induction is some evidence required that the order to report was ever executed?

2. Are the following individually, or collectively, denials of due process:

> First, were the tests for sincere conscientious objection, used by the hearing officer of the Department of Justice, lawful ones?
> Second, did the hearing officer mislead appellant concerning the adverse evidence (so that opportunity for rebuttal or explanation was not afforded, said adverse evidence being used thereafter as a basis for his recommendation)?
> Third, was appellant entitled to copies of the hearing officer's report and the Attorney General's opinion in advance of the appeal board's decision, despite the fact no regulation requires that such an opportunity to rebut be given?

3. Was there any basis in fact for denying appellant a continuation of his dependency classification, for denying his claims for an agricultural classification and for one of the two conscientious objector classifications?

4. Was the appellant entitled to use the F. B. I. reports he had subpoenaed to show the trial court that the hearing officer's report was not an honest one?

SPECIFICATION OF ERRORS

The District Court erred

1. In not concluding that there was a failure of proof that a valid order to report had been issued [R. 11].

2. In not concluding that appellant had been denied due process of law in connection with his hearing before the hearing officer of the Department of Justice [R. 10, 25-26].

3. In not concluding that the final classification of appellant was without basis in fact [R. 10, 26].

4. In refusing appellant permission during trial to use the F. B. I. reports to impeach the honesty of the hearing officer's recommendation [R. 24].

"1632.1 Order to Report for Induction.—Immediately upon determining which men are to report for induction, the local board shall prepare for each man an Order to Report for Induction (SSS Form No. 252) in duplicate. The date specified for reporting for induction shall be at least 10 days after the date on which the Order to Report for Induction (SSS Form No. 252) is mailed, except that a registrant classified in Class I-A or Class I-A-O who has volunteered for induction may be ordered to report for induction on any date after he has so volunteered if an appeal is not pending in his case and the period during which an appeal may be taken has expired. The local board shall mail the original of the Order to Report for Induction (SSS Form No. 252) to the registrant and shall file a copy in his Cover Sheet (SSS Form No. 101)."

Appellant believes that the regulations do not require the board to make in "duplicate" any other Order or Notice sent to a registrant. A typical method of recording action is found in §1623.4(d) Action To Be Taken When Classification Determined:

"(d) When the local board classifies or changes the classification of a registrant, it shall record such classification on the Classification Questionnaire (SSS Form No. 100) the Classification Record (SSS Form No. 102), and in the space provided therefor on the face of the Cover Sheet (SSS Form No. 101)."

In a few instances the regulations require that "copies" of documents be preserved and it has been held that local boards must obey such mandatory provisions.

On December 14, 1953, Judge Harry C. Westover (S. D. of Calif.) declared, in his written memorandum of opinion in *United States v. Nichols,* No. 22,951, wherein he acquitted the defendant:

> "However, if the local board determines that the new facts would not justify a change in classification and refuses to reopen, the regulations provide:
>
> > " 'In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file.'
>
> "On 9/30/52, when the local board refused to reopen registrant's case, it mailed him form C-140. Even if Form C-140 should be considered a letter, no copy of said form appears in registrant's selective service file. As a consequence, there is no escape from the conclusion that the local board did not follow the regulations."

Preservation of a duplicate of the Order to Report for Induction is important in the event proof is needed of the precise execution of the act. This order is a most serious notice and, in fact, is the only one issued in the name of the President of the United States.

Appellant submits that the defect complained of is jurisdictional and that the public interest requires that orders of such importance be executed and not be like blank checks.

> *United States ex rel. Bayly v. Reckord,* 51 Fed. Supp. 507:
>
> "*And the regulation must be observed,* not so much out of tenderness for the individual, but *for the public benefit.* It is incidental only that the petitioners, as individuals specially affected, are entitled to invoke the application of the regulation." [Emphasis supplied.] [p. 515].

Ordinarily, even less important safeguards, required by the regulations to be observed as a condition precedent to induction into the Armed Forces, must be strictly followed. If not observed, the order to report is considered void. See *Ver Mehren v. Sirmeyer,* 36 F. 2d 876, 882: "There must be full and fair compliance with the provisions of the Act and the applicable regulation." Also see *United States v. Zieber,* 161 F. 2d 90. This principle is widely recognized so that there have been over four dozen trial decisions in the last two years where the failures of the Selective Service System to comply with regulations have resulted in acquittals. In *United States v. Strebel,* 103 Fed. Supp. 628, the court concluded: "The Court finds as a fact that the regulations were not fully complied with. It therefore concludes, as a matter of law, that the motion for a judgment of acquittal at the close of all the evidence should be granted." [631].

Although liberality of decision is not necessarily needed in the instant case, appellant believes it is to be observed that the recent selective service decisions are more liberal than those of Wold War II. The reason is perhaps correctly stated in *Ex Parte Fabiani,* 105 Fed. Supp. 139. The opinion is of added interest because it is the last reported decision of former Attorney General McGranery as a District Judge:

> "The purpose of the 1948 and 1951 Acts, to the contrary, is merely to achieve and maintain sufficient armed strength to deter aggression; it is not to prepare for war.
>
> . . .
>
> "The different objective to be achieved by the new Act behooves us to employ a more liberal standard of judicial review, so as better to protect the rights of the individual. Should—which God forbid—world tensions increase greatly or should general war come, then the judicial arm can once again cut to the barest minimum its supervision of the operations of the draft." [146-7].

There should have been some proof on this essential element. There was not a word of testimony from any of the board members or the clerk that the duplicate sent the defendant had been signed or even that they were customarily signed. All that can be presumed is that the appellant was sent and received the original duplicate of the SSS Form No. 252 reproduced in the Exhibit at page 51. Appellant believes this court's concluding expression in *Knox v. United States,* 200 F.

2d 398 disposes of the usual crutch of presumption of regularity:

> "But, it is suggested, a presumption of regularity or of the due performance of duty attends official action; and it should be presumed in this instance not only that the local board considered the claim of the registrant, but that in light of them it took action to continue in effect his original 1-A classification. We think the court may not indulge the presumption, at least in the latter respect, in the condition of the record in the case. Our reasons for so believing have already been sufficiently developed." [402].

II.

APPELLANT WAS DENIED DUE PROCESS OF LAW IN CONNECTION WITH HIS HEARING BEFORE THE HEARING OFFICER OF THE DEPARTMENT OF JUSTICE.

FIRST: *The hearing officer based his Advisory Opinion on a misconception of the law.* In rejecting appellant's professions that he was a genuine conscientious objector the hearing officer used many items of conduct and of belief as standards, none of which are legal tests. The only test is that set up by the Act and the Regulations: sincere religious belief, based on religious training. (§6(j) of the Act and §§1622.11 and 1623.14 of the Regulations).

The hearing officer's advisory opinion (Ex. 43-44) uses the following: "that he would protect his family

and his farm, . . . only in recent years that he has refrained from smoking and drinking, and that he works on Sunday, and that he was in the Merchant Marine for six months."

There is nothing in the selective service law that proscribes smoking, drinking, belief in self-defense, working on Sunday or in the Merchant Marine. Nor did his religious leaders consider that his conduct disqualified him from being considered a good Molokan or that he wasn't sincerely a genuine conscientious objector on religious grounds. On the contrary the hearing officer relates that the elder testified ". . . he had known registrant all his life and that the young man had accepted the Spirit and is of good character, and that he goes to church every Sunday. . . ."

The use of illegal standards has been the subject of several recent decisions.

The most recent is by the Eighth Circuit: *Taafs v. United States,* ..... F. 2d ....., decided December 7, 1953, No. 14.791. The court struck down, as an illegal standard, that Taafs was not a pacifist; the court held that Taafs' belief in self-defense did not disqualify him for a conscientious objector classification:

> "A person's willingness to use force in self-defense is not a valid objection to denial of conscientious objector status where other evidence of his opposition to participation in war because of religious belief is undisputed. *United States v. Pekarski,* 2 Cir., Doc. No. 22,636, ...F. 2d .....; *Annett v. United States,* 10 Cir., 205 F. 2d 689."

Pekarski, supra, decided October 23, 1953 held:

> "The willingness to act in self-defense and then only without weapons appears to us to be no negation of his evidence that he was conscientiously opposed by reason of his religious training and belief to service in the armed forces in noncombatant duty. We cannot distinguish this case from *Annett v. United States,* 10 Cir., 205 F. 2d 689, which we are disposed to follow in holding that the local board had no evidence before it to support the classification of the registrant 1-A-O."

Annett, supra, decided June 26, 1953 discusses illegal standards more than the later decisions. In addition to the oft-quoted "The statute does not make humility, whatever that means, an element of one's right to exemption from military service on the ground of religious scruples and beliefs against war." [692].

The Tenth Circuit stated:

> "During the investigation, Annett was asked if he believed in self defense and he frankly stated that he did and that he would kill if necessary to defend and preserve his life. Belisle believed that this was inconsistent with the claim of religious scruples and beliefs against participation in war. In his report he stated, 'Your hearing officer was not impressed with the manner in which the registrant answered questions propounded to him. There is an abundant amount of evidence furnished in his behalf, principally by members of his own faith. However, a large portion of it is

devoted to his ministerial activities, which your hearing officer is not endeavorng to pass upon other than in connection with the claim of registrant as a conscientious objector. Your hearing officer is unable to reconcile the belief of the registrant that he may, under the Scriptures, defend himself even to the extent of killing, but not able, under his faith, to serve his country in military service; especially, where he was unable to state his authority for the defense of himself in the same Bible which he uses to sustain his objections. Your hearing officer is not satisfied with the sincerity of the registrant for the further reason that the evidence furnished by the registrant was inadequate and did not have that quality necessary to sustain his position.'

"It is thus clear that Belisle applied an erroneous standard in determining that Annett was not entitled to a conscientious objector status. The standard laid down in the statute is religious training and belief opposed to participation in war in any form and as stated in the statute, 'Religious training and belief in this connection means an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relations . . .' Annett's positive uncontradicted testimony established that his religious beliefs met this test. The mere fact that he was willing to fight in defense of his own life does not mean that he did not have good faith religious scruples based upon the teachings of his church against the command of his country to go to war and kill therein." [691].

It is appellant's belief that his expressed willingness to protect his family and his farm and his history of having been 6 months in the merchant marine are met by the above decisions and this court is urged to follow the Second, Eighth and Tenth Circuits on this subject.

It is appellant's belief that the other matters used by the hearing officer in his advisory opinion are wholly inapplicable as tests for a Molokan's religious belief and/or are answered adequately by the factual material in the Exhibit. However, the use of these items of fact by the hearing officer damaged appellant. This point is well put in *United States v. Everngam*, 102 F. Supp. 128:

> "It does not appear that any member of the appeal board felt himself bound by this report and recommendation or how far, if at all, it influenced the decision of the appeal board, but that is not enough. The report and recommendation was transmitted to the appeal board to use as an advisory opinion, and was considered and used (as the regulations require) by the appeal board in its subsequent classification of the defendant. Under such circumstances the prosecution was bound to prove that such invalid report and recommendation of the hearing officer of the Department of Justice did not affect the decision of the appeal board, or any subsequent decision of the local board. No such proof was offered. And had such proof been offered, there is considerable doubt whether such proof would have cured the error,

> inasmuch as the report and recommendation of the Department of Justice is an important and integral step in the conscription process, for the protection of the registrant, as well as the government."

SECOND: The hearing officer misled the appellant into thinking that the adverse F.B.I. gathered material was not of controlling important and then unfairly used it to reject appellant's claim.

The hearing officer encouraged the appellant to believe he could expect a not unfavorable recommendation:

> "Well, as we were ready to leave, he gave us all a big smile and shook our hands and told us that he felt that all us conscientious objectors should be allowed to get off; that if he had his way, all of us would, would not have to—well, I don't know how I should state it—none of us would have to go through this." [R. 20].

The opportunity the hearing officer gave appellant to rebut and discuss unfavorable evidence was insufficient to give the hearing officer a correct understanding of the meaning of "receiving the Holy Spirit" [R. 19], or that appellant had been a "weak Christian" only to age 15 [R. 18], or that work on Sunday was not proscribed for Molokan farmers [R. 19] and that the elder's presence at the hearing was a stamp of approval [R. 19]. Had appellant been informed of the hearing officer's fragmentary conception of the

facts he could have made an intelligent attempt to meet this adverse situation. In *United States v. Bouziden,* 108 F. Supp. 395 the court disapproved of such a hearing as not being a fair one:

> "The purpose of the hearing is to enable the hearing officer to form an intelligent opinion regarding the registrant. The opinion formed is reflected in the advisory recommendation to the appeal board. The hearing officer must not be permitted to withhold unfavorable information gained during the inquiry, and giving no opportunity to rebut at the hearing, *then use this same unfavorable information as a basis for his adverse advisory recommendation.* If this is done the hearing itself becomes a sham and a farce. Why hold a hearing to determine a fact if there is a predetermination of the fact and no intent to discuss the basis of the predetermination?" [398]. (Italics are Judge Wallace's.)

THIRD: Appellant should have been furnished copies of the hearing officer's advisory opinion to the Department of Justice, and of the Department's recommendation to the Appeal Board *before* the Appeal Board acted.

Appellant's attempt, after the die was cast (Ex. 47-49), to rebut the hearing officer's adverse advisory opinion (Ex. 41-44) emphasizes the unfairness of not furnishing the appellant such documents *before* the appeal board acted.

In carrying out the conscientious objector procedure of Section 6(j) of the Universal Military Training and Service Act it has always been, and still is, the policy of the Department of Justice to not give an opportunity to the registrant to answer an unfavorable recommendation. It sends its recommendation to the board of appeal without notice to the conscientious objector. The appeal board acts on the recommendation without first notifying the registrant. It does not give him a chance to answer the unfavorable recommendation made by the Department of Justice. These acts of the department and the appeal boards violate the act and the due process clause of the Fifth Amendment.

The act says that classifications must be fair and just. The Fifth Amendment guarantees due process of law. When the departmental recommendation is adverse and is acted upon by the appeal board without notice to the registrant to deny his claim for classification as a conscientious objector it is neither fair and just nor in accordance with due process.

Therefore, the procedure followed by the Department of Justice and the Selective Service System in all conscientious objector cases handled by the department is invalid. The registrant should have the right to answer the unfair report and recommendation before the appeal board. Since he does not, he is not given a full and fair hearing before the appeal board. The recommendation is made available to the registrant after the appeal board has denied his conscientious objector claim, classified him and returned the file

to the local board. After he has lost the appeal it is too late for the registrant to see the adverse recommendation. He must see it in time to protect himself before the appeal board. Since the adverse recommendation is considered without notice to the registrant and is followed there is a denial of due process in violations of the Act and the Fifth Amendment.

The Department of Justice and the board of appeal deprived the defendant of his procedural rights to due process of law. This the Department of Justice did by not mailing a copy of its recommendation to the defendant and giving him an opportunity to answer the adverse recommendation before forwarding it to the appeal board. The appeal board did this by considering the final classification of the defendant without sending to him a copy of the unfavorable departmental recommendation and giving him opportunity to answer it before it denied the conscientious objector status.

Appellant placed directly before the trial court the issue of the correctness and fairness of the hearing officer's advisory opinion and that fairness and due process required that it be available to him *before* the appeal board acted. [R. 15-20]. Concerning the Attorney-General's recommendation to the appeal board: appellant believes it is necessarily bound-up with the hearing officer's advisory opinion and that the appellant may properly ask this court to consider his argument that he was entitled to a copy of both documents before the appeal board acted.

Supporting this argument are:

United States v. Abilene & S. Ry. Co., 265 U. S. 274, 290;

Interstate Commerce Comm'n v. Louisville & Nashville R. R. Co., 227 U. S. 88, 91-92, 03;

State of Washington ex rel. Oregon R. R. & Navigation Co. v. Fairchild, 224 U. S. 510, 524;

Kwock Jan Fat v. White, 253 U. S. 454, 459, 463, 464;

Morgan v. United States, 304 U. S. 1, 22, 23;

Chin Yow v. United States, 208 U. S. 8, 11, 12;

See also:

Degraw v. Toon, 151 F. 2d 778 (2nd Cir.);

Chen Hoy Quong v. White, 249 F. 2d 869 (9th Cir. 1918);

Mita v. Bonham, 25 F. 2d 11, 12;

O'Hara v. Berkshire, 76 F. 2d 204, 207 (9th Cir.).

III.

THE CLASSIFICATION OF APPELLANT IN CLASS I-A WAS ARBITRARY AND WITHOUT BASIS IN FACT.

The appellant presented evidence that he was a farm worker, meeting all the standards of the selective service regulations for an agricultural classification (II-A); his evidence also showed that he was a registrant having a dependent, and entitled to the dependency classification of III-A. Since the regulations state that on every classification and reclassification the registrant is to be placed in the "lowest" class his evidence requires [32 C.F.R. 1623.2] appellant was classified in Class III-A, this class being "lower" than Class II-A.

When appellant was reclassified on April 5, 1951 from Class III-A to Class I-A the board acted arbitrarily and without any basis in fact for it possessed no information reflecting adversely on the evidence used as its basis for the III-A; nor had the standards of the selective service regulations for a III-A or II-A been changed. On the contrary, some new evidence had been added that corroborated and supported his claims for the lower classifications of III-A and II-A.

Possibly the basis for the demotion was a belief that his claim of March, 1951 for a conscientious objector classification disqualified or discredited him. This alone could not. As was said in the recent *Tuafs*

decision *(Taafs v. United States,* ..... F. 2d ....., 8 C.A., decided December 7, 1953:

> "It is made clear by the authorities, as well as by the Act itself, that successive deferments may be claimed on different grounds. Selective Training and Service Act of 1940, Sec. 5 (h), 50 U.S.C.A. App. sec. 305 (h); *United States v. Stalter,* 7 Cir., 151 F. 2d 633; *United States v. Graham,* 109 F. Supp. 377. Section 305 (h) of the 1940 Act is now contained in section 456 (k), 50 U.S.C.A. App. 456 (k)."

To this could be added the following from the *Bodenstein* case *(U. S. ex rel. Bodenstein v. Nichols,* 151 F. 2d 155):

> "If the lower Court meant to hold that a III-D dependency classification was not available to a conscientious objector it was in error. See 'Selective Service as the Tide of War Turns,' page 178,[1] where the following is found: The objector, like all other registrants, may be entitled to deferment on the grounds of occupation or dependency, and until or unless such deferment is canceled, the issue would not be raised. The objector receives the same treatment as all other registrants.'
>
> "[1] We take that to mean that a conscientious objector, who is eligible to a Class III-D deferment, would first receive such a classification and that the issue of his conscientious objections would not be raised until and unless the III-D classification was canceled." [157].

Possibly the basis for the demotion was a prejudice against conscientious objectors. If this was the reason then no argument is needed.

In any event some basis in fact was needed to justify the demotion. As was said in *Ex Parte Stanziale,* 49 F. Supp. 961 (rev. on other grounds in 138 F. 2d 312):

> "[1] It is concluded as a matter of law that when the Local Board on January 15, 1942, classified Adolph B. Stanziale in Class 3-A it made a proper classification in accordance with the facts before it. That when the Board on November 13, 1942, changed his classification from Class 3-A to Class 1-A and subsequently ordered his induction with nothing before it changing the situation that existed on January 15, 1942, their action in so reclassifying Adolph B. Stanziale and subsequently ordering his induction was unlawful, arbitrary and capricious." [962].

The Supreme Court's latest Selective Service decision also covers this point. *Dickinson vs. United States,* ..... S. Ct....., decided November 30, 1953. The final sentence of Dickinson is:

> "But when the uncontroverted evidence supporting a registrant's claim places him *prima facie* within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice."

IV.

THE COURT ERRED IN REFUSING APPELLANT PERMISSION DURING THE TRIAL TO INSPECT AND USE THE F. B. I. INVESTIGATION REPORTS.

During the trial the appellant desired to inspect these reports (R. 20-). The court made an in camera inspection and ruled that the value of the reports to the appellant was outweighed by the public interest in preserving the secrecy of the F.B.I. investigation. (R. 24).

It is not enough that the trial court be satisfied. The appellant should have had the opportunity to inspect, then use and argue whatever material of value to his defense existed therein.

Further, without such an inspection he could not determine if he had been given a fair resume.

During the trial appellant attempted to establish that the hearing officer did not make a fair report. The trial court apparently did not believe that a hearing officer's advisory opinion could be the basis of a claim of denial of due process. The court ruled "What is in the hearing officer's report . . . is immaterial." (R. 16).

This was before publication of this court's decisions in *Linan vs. United States,* 202 F 2 693 and *Kent vs. United States,* 202 F. 2 234 wherein it was stated that a hearing officer's advisory opinion could be so factually incorrect that all further processing was vitiated.

Finally the hearing officer misconstrued the testimony given him concerning the meaning of receiving the Holy Spirit as understood by appellant and his religious leaders. (R. 19). The hearing officer misrepresented the "working on Sunday" point with respect to the *Molokan's* attitude on such activity. (R. 19). The same is true with respect to their attitude on smoking and drinking. R. 20). The hearing officer's report (Ex. 44) clearly gave the Attorney General and the appeal board to understand that such conduct adversely reflected on the sincerity of appellant. Such conduct, in many of the 400 denominations existing in the United States unquestionably would reflect on a registrant's sincere acceptance of the tenets of his sect. This is common knowledge. The appeal board and the Attorney General considered the hearing officer their man on the spot, their expert. What do they know about Molokans? In fact, there are Molokan groups only in southern California. When the hearing officer used such standards the Attorney General and the appeal board had the right to assume that he knew what he was talking about; that such standards were used by the Molokans in differentiating true followers from "weak Christians". How much the hearing officer's poor advisory opinion influenced them we do not know but the damage was done. See *Everngam, supra.*

CONCLUSION

For the errors above discussed the judgment of guilty should be reversed.

Respectfully submitted,

J. B. TIETZ
Attorney for Appellant.

No. 13938

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK KALPAKOFF,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

LAUGHLIN E. WATERS,
United States Attorney;

MANLEY J. BOWLER,
Assistant United States Attorney,
Chief of Criminal Division;

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TABLE OF AUTHORITIES CITED

No. 13938

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK KALPAKOFF,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

I.

STATEMENT OF JURISDICTION.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California on November 19, 1952, under Section 462 of Title 50, App., United States Code, for refusing to submit to induction into the armed forces of the United States. [R.[1] pp. 3-4.]

On December 8, 1952, the appellant was arraigned, entered a plea of not guilty, and the case was set for trial on February 9, 1953.

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[1]"R." refers to "Transcript of Record."

On March 26, 1953, trial was begun in the United States District Court for the Southern District of California by the Honorable William C. Mathes, without a jury, and on March 26, 1953, the appellant was found guilty as charged in the Indictment. [R. p. 26.]

On April 7, 1953, the appellant was sentenced to imprisonment for a period of four years and judgment was so entered. [R. pp. 4-5.] Appellant appeals from this judgment. [R. pp. 6-7.]

The District Court had jurisdiction of this cause of action under Section 462 of Title 50, App., United States Code, and Section 3231, Title 18, United States Code.

This Court has jurisdiction under Section 1291 of Title 18, United States Code.

II.

STATUTES INVOLVED.

The Indictment in this case was brought under Section 462 of Title 50, App., United States Code.

The Indictment charges a violation of Section 462 of Title 50, App., United States Code, which provides, in pertinent part:

> "(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [Section 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution

of this title [said sections], or rules, regulations, or directions made pursuant to this title [said section] . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years, or a fine of not more than $10,000, or by both such fine and imprisonment . . ."

III.

STATEMENT OF THE CASE.

The Indictment charges as follows:

"Indictment—No. 22575-CD Criminal [U. S. C., Title 50, App., Sec. 462—Universal Military Training and Service Act.]

"The grand jury charges

"Defendant Jack Kalpakoff, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 85, said board being then and there duly created and acting, under the Selective Service System established by said act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class I-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on July 28, 1952, in Los Angeles County, California, in the division and district aforesaid; and at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regula-

tions promulgated thereunder in that he then and there knowingly failed and neglected to report for induction into the armed forces of the United States as so notified and ordered to do." [R. pp. 3-4.]

On December 8, 1952, appellant appeared for arraignment and plea, represented by J. B. Tietz, Esq., before the Honorable William C. Mathes, United States District Judge, and entered a plea of not guilty to the offense charged in the Indictment.

On February 9, 1953, the case was called for trial before the Honorable William C. Mathes, without a jury, and J. B. Tietz, Esq., represented the defendant-appellant. On March 26, 1953, appellant was found guilty as charged in the Indictment. [R. p. 26.]

On April 7, 1953, the appellant was sentenced to imprisonment for a period of four years in a penitentiary. [R. pp. 4-5.]

Appellant assigns as error the judgment of conviction on the following grounds:

A. The District Court erred in not concluding that there was a failure of proof that a valid order to report had been issued. [App. Spec. of Error 1, App. Br. p. 4b.][2]

B. The District Court erred in not concluding that appellant had been denied due process of law in connection with his hearing before the Hearing Officer of the Department of Justice. [App. Spec. of Error 2, App. Br. p. 4b.]

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[2]"App. Spec. of Error" refers to "Appellant's Specification of Errors"; "App. Br." refers to "Appellant's Brief."

C. The District Court erred in not concluding that the final classification of appellant was without basis in fact. [App. Spec. of Error 3, App. Br. p. 4b.]

D. The District Court erred in refusing appellant permission during trial to use the F.B.I. reports to impeach the honesty of the Hearing Officer's recommendation. [App. Spec. of Error 4, App. Br. p. 4b.]

IV.

STATEMENT OF THE FACTS.

On September 14, 1948, Jack Kalpakoff registered under the Selective Service system with Local Board No. 85, Pasadena, California. He was nineteen years of age at the time, having been born on February 12, 1929. He gave his occupation as "Farmer" and indicated that his farm was in Lancaster, California. [F. 1.][3]

On October 18, 1948, the appellant filed with Local Board No. 85, SSS Form 100, Classification Questionnaire. [F. 4-12.]

On November 4, 1948, the appellant was classified in Class I-A and was mailed SSS Form 110, Notice of Classification, on the same date.

On November 12, 1948, the appellant filed a letter of appeal for a reclassification. [F. 13-14.]

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[3]Numbers preceded by "F." appearing herein within brackets refer to pages of appellant's draft board file, Government's Exhibit No. 1, a file of photostatic copies of papers filed in the cover sheet of appellant's draft board file. At the bottom of each page thereof appears an encircled handwritten number which identifies the pages in the draft board file.

On October 3, 1950, SSS Form 223 was mailed to the appellant, ordering him to report for a pre-induction physical examination, but this order was cancelled on October 5, 1950, because the appellant was reclassified in Class III-A until April 5, 1951. [F. 3, 11.]

On October 9, 1950, SSS Form 110, Notice of Classification, was mailed to the appellant.

On March 26, 1951, the appellant called at the Board and was handed SSS Form 150, Special Form for Conscientious Objector. This form was filed with the Local Board on March 30, 1951. [F. 11, 20-23.]

On April 5, 1951, the appellant was classified in Class I-A, and was mailed SSS Form 110, Notice of Classification, on April 6, 1951.

On April 16, 1951, the appellant filed notice of appeal from this classification. [F. 11, 25.]

On May 28, 1951, SSS Form 223, Order to Report for Armed Forces Physical Examination, was mailed to appellant to report for physical examination on June 8, 1951. [F. 11, 26.]

On June 18, 1951, NME Form 62 mailed to appellant. He was found acceptable for induction into the armed services. [F. 11, 27.]

On June 21, 1951, the cover sheet and contents of the appellant's file was forwarded to the Appeal Board. On June 25, 1951, the Appeal Board reviewed the file and determined that the registrant is not entitled to classification in either a class lower than IV-E or in Class IV. [F. 11, 38.]

On March 25, 1952, the appellant personally appeared at the hearing in response to the notice mailed to him,

before Nathan O. Freedman, Hearing Officer. [F. 42-44.] The Hearing Officer recommended that, based on the appellant's testimony, he should be classified in Class I-A. [F. 44.]

On April 24, 1952, the Department of Justice, after examination and review of the entire file and record, recommended to the Board that the registrant be not classified as a conscientious objector. [F. 40.]

On May 7, 1952, appellant was classified in Class I-A by the Appeal Board and Form 110, Notice of Classification, was mailed to the appellant. [F. 11.] On May 19, 1952, a letter from the appellant was received, appealing his classification given by the Appeal Board. [F. 11, 45.] On the same date, a letter was sent to the appellant advising him that he had no further right of appeal. [F. 11, 46.]

On May 27, 1952, SSS Form 252, Order to Report for Induction, was mailed to appellant, ordering him to report for induction on June 10, 1952. [F. 11, 51.]

On June 9, 1952, SSS Form 264, Postponement of Induction, was mailed to appellant, Jack Kalpakoff, by authority of the Director of Selective Service under SSS Regulation 1632.2. [F. 11, 55.] The induction was postponed by authority of the Director of Selective Service so that the file could be forwarded to Selective Service Headquarters. [F. 11, 55-57.]

On July 15, 1952, the complete file and cover sheet were returned from California Headquarters, Selective Service System. The information in the file was considered and no action was taken inasmuch as the facts presented did not warrant the reopening or reclassification of the appellant. [F. 11, 65-66.]

On July 16, 1952, the appellant was directed by letter to report for induction on July 28, 1952, inasmuch as reason for postponement of original induction scheduled for June 10, 1952, no longer existed. [F. 11, 67.]

On July 28, 1952, the registrant failed to appear for induction as ordered. [F. 11.] On August 1, 1952, Local Board No. 85 received a letter from the appellant, stating that he could not appear for induction into the Army. [F. 74.] On August 14, 1952, the registrant was declared a delinquent. [F. 12, 75.]

V.

ARGUMENT.

POINT ONE.

The Order to Report for Induction Was Valid.

The controlling Section, in the event of a postponement of induction, is Section 1632.2 of the Selective Service Regulations (32 C. F. R., Sec. 1632.2, Postponement of Induction), which is as follows:

* * * * * * * *

"(b) The local board shall issue to each registrant whose induction is postponed a Postponement of Induction (SSS Form No. 264), shall mail a copy of such form to the State Director of Selective Service, and shall note the date of the granting of the postponement and the date of its expiration in the 'Remarks' column of the Classification Record (SSS Form No. 102).

"(c) Any period of postponement authorized in paragraph (a) of this section may be terminated before the date of its expiration when the issuing authority so directs and the registrant shall then report for induction at such time and place as may be fixed by the local board.

"(d) A postponement of induction shall not render invalid the Order to Report for Induction (SSS Form No. 252) which has been issued to the registrant but shall operate only to postpone the reporting date and the registrant shall report on the new date without having issued to him a new Order to Report for Induction (SSS Form No. 252)."

The Regulations set out, in certain and specific language, the procedure for ordering registrants to report for induction and, in the event of postponement of induction. Section 1632.2 provides that the Director of Selective Service, or any State Director of Selective Service may, for good cause, after the issuance of an order to report for induction, postpone the induction of the registrant until such time as he may deem advisable, and no registrant whose induction has been thus postponed shall be inducted into the Armed Forces during the period of such postponement. The procedure for the Local Board to follow is in subsection (b), wherein the Local Board is directed to issue to each registrant whose induction is postponed, a Postponement of Induction (SSS Form 264). Subsections (c) and (d) of Section 1632.2 indicate the method of terminating the postponement of induction. No specific form is designated for the termination of the period of postponement. Subsection (d), however, states that a postponement of induction shall not render invalid the Order to Report for Induction, but operates only to postpone reporting date, and the registrant shall report on the new date without having issued to him a new Order to Report for Induction (SSS Form 252). These requirements, it is submitted, have been complied with by the Local Board and thus the Order to Report for Induction was a valid one.

POINT TWO.

There Was No Denial of Due Process Upon the Personal Appearance of the Appellant Before the Hearing Officer of the Department of Justice.

The statute granting the exemption reads as follows:

> *"Title 50, App., United States Code, §456. Deferments and exemptions from training and service.*
>
> * * * * * * * *
>
> "(j) Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

It is necessary, however, for a person who claims exemption from combatant or noncombatant training, to have his claim sustained by the Selective Service System. Thus, a registrant who desires a conscientious objection exemption must satisfy the Selective Service System as to the validity of his claim for exemption in the following particulars: (1) he must be conscientiously opposed to war in any form; (2) this opposition must be by reason of the registrant's religious belief, and (3) his religious training; (4) in addition, the character of the registrant, and (5) the good faith and sincerity of his objections are judged.

To determine the conscientious objections and the validity thereof, the registrant is given a hearing before a Hearing Officer of the Department of Justice. As this

time, the Hearing Officer is able to observe the demeanor of the registrant, test his good faith and the sincerity of his conscientious objection claims, and allow the registrant to be heard in regard to his conscientious objector claims. *United States v. Nugent,* 346 U. S. 1.

It is submitted that conscientious objection is an intangible thing, and as such it is difficult to determine whether or not a registrant is a conscientious objector. The Hearing Officer was able to review the registrant's file prior to the time of the hearing and was able to converse with him in regard to his claims. The statements of facts in Government's Exhibit No. 1 (pp. 43 and 44) indicate that this occurred: the Hearing Officer concluded that the registrant is not a conscientious objector, basing his conclusions on the entire Selective Service file, his observations of the registrant, and the facts as stated in his conclusions.

Taken in this light, the Hearing Officer's recommendation has basis in fact and is a valid one.

In answer to appellant's third point on page 15 of the Appellant's Brief, see *infra,* the discussion under Point Four.

POINT THREE.

The Classification of Appellant in Class I-A Was With Basis in Fact and Not Arbitrary.

There is no constitutional right to exemption from military service because of conscientious objection or religious calling. In *Richter v. United States,* 181 F. 2d 591 (9th Cir.), this Court said:

> "Congress can call everyone to the colors, and immunity from military service arises solely through congressional grace in pursuance of traditional American policy of deference to conscientious objection, and there is no constitutional right to exemption because of conscientious objection or religious calling or conviction or activities."

Accord:

Tyrrell v. United States, 200 F. 2d 8 (9th Cir.).

Congress has granted exemption and deferment from military service only to those who qualify under the procedure set up by Congress to determine classification—the Selective Service System. This procedure is administrative even though one may be criminally prosecuted for failure to comply with the orders of the Selective Service System.

Falbo v. United States, 320 U. S. 549;

Williams v. United States, 203 F. 2d 85 (9th Cir.).

The duty to classify, to grant or deny exemptions rests upon the draft boards, local and appellate. The burden is upon a registrant to establish his eligibility for deferment, or exemption, to the satisfaction of the local board.

United States v. Schoebel, 201 F. 2d 31 (7th Cir).;

Davis v. United States, 203 F. 2d 853 (8th Cir.).

Each registrant is considered to be available for military service.

32 C. F. R., Sec. 1622.1(c);

United States v. Schoebel, supra.

Every registrant who has failed to establish to the satisfaction of the local board that he is eligible for classification in another class is placed in Class I-A.

32 C. F. R., Sec. 1622.10.

The Local Board carefully considered the claim of the appellant for exemption. In fact, the Board did grant the appellant a III-A classification for six months by reason of his farming activities. [F. 11, 46, 52.] The classification of the Local Board, and thereafter of the Appeal Board, is final. The United States Supreme Court in *Estep v. United States,* 327 U. S. 114, at pages 122-123, stated in this regard:

> ". . . The provision making the decision of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judiciary review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."

Accord:

Martin v. United States, 190 F. 2d 755 (4th Cir.), *cert. den.* 342 U. S. 872.

POINT FOUR.

The District Court Did Not Err in Refusing to Allow the Investigative Report of the Federal Bureau of Investigation to Be Introduced Into Evidence.

United States v. Nugent, supra, appears to be a controlling case in this regard. The Court held that such a procedure as occurred in this case was constitutional. It stated that the statutory scheme for review of exemptions claimed by the conscientious objectors does not entitle them to have the investigator's report reproduced for their inspection, on pages 5 and 6 of the Opinion. It appears that the Hearing Officer complied with the requirements as set forth by the *Nugent* case in regard to giving the adverse evidence, if any, to the registrant that may have been contained in the Federal Bureau of Investigation report. [R. pp. 20-21.]

The Court made an *in camera* examination of the documents before ruling on the motion of the defendant for the admission of the investigation report into evidence. The Court held that the report of the Federal Bureau of Investigation as to the conscientious objection claims of the defendant is irrelevant and immaterial. Accordingly, the documents were not entered into evidence. [R. p. 24.] It is within the power of the trial court to exclude irrelevant, immaterial and incompetent evidence. Procedural irregularities or admissions which do not result in prejudice to the appellant are to be disregarded. *Martin v. United States,* 190 F. 2d 775; *Atkins v. United States,* 204 F. 2d 269.

VI.
CONCLUSION.

The appellant was indicted for failure to report on a valid order to report for induction.

There was no denial of due process of law in connection with the hearing before the Hearing Officer of the Department of Justice.

The classification of appellant in Class I-A was with basis of fact and not arbitrary.

The trial court committed no error when it refused to receive into evidence the Federal Bureau of Investigation report and excluded it from inspection and use by the appellant in the trial of this case.

There was no error of law in the rulings of the trial court and therefore, the conviction should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney;
MANLEY J. BOWLER,
Assistant United States Attorney,
Chief of Criminal Division;
MANUEL L. REAL,
Assistant United States Attorney,
Attorneys for United States of America,
Appellee.

No. 13939

United States
Court of Appeals
for the Ninth Circuit

WILLIAM JOY BATELAAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—10-23-53

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

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Los Angeles 12, Calif.

For Appellee:

WALTER S. BINNS,
United States Attorney,

MARK P. ROBINSON,
MANUEL REAL,
Assistants U. S. Attorney,
600 Federal Bldg.,
Los Angeles 12, Calif.

In the United States District Court in and for the Southern District of California, Central Division

No. 22574 CD

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM JOY BATELAAN,

Defendant.

INDICTMENT

[U.S.C., Title 50, App., Sec. 462—Universal Military Training and Service Act]

The grand jury charges:

Defendant William Joy Batelaan, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 83, said board being then and there duly created and acting, under the Selective Service System established by said act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class I-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on October 13, 1952, in Los Angeles County, California, in the

division and district aforesaid; and at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do.

A True Bill.

/s/ LAWRENCE L. ROGERS,
Foreman.

/s/ WALTER S. BINNS,
United States Attorney.

ADM:AH

[Endorsed]: Filed November 19, 1952. [2*]

United States District Court for the Southern District of California, Central Division

No. 22574-Cr.

UNITED STATES OF AMERICA,

vs.

WILLIAM JOY BATELAAN.

JUDGMENT AND COMMITMENT

On this 7th day of April, 1953, came the attorney for the government and the defendant appeared in person and with his attorney, J. B. Tietz, Esquire.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a finding of guilty of the offense of having on October 13, 1952, in Los Angeles County, California, knowingly failed and neglected to perform a duty required of him under the Universal Military Training and Service Act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do, as charged in the Indictment; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four years in an institution to be selected by the Attorney General of the United States or his authorized representative for the offense charged in the indictment.

It Is Adjudged that execution be stayed until 4 p.m. on Thursday, April 9, 1953, and that the bail of the defendant be exonerated upon surrender of the defendant to the United States Marshal at or prior to 4 p.m. on April 9, 1953.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and

that the copy serve as the commitment of the defendant.

/s/ WM. C. MATHES,
United States District Judge.

EDMUND L. SMITH,
Clerk

By /s/ P. D. HOOSER,
Deputy Clerk.

[Endorsed]: Filed April 7, 1953. [7]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Appellant, William Joy Batelaan, resides at 12583 Adelphia Street, San Fernando, California.

Appellant's attorney, J. B. Tietz, maintains his office at 534 Douglas Building, 257 South Spring Street, Los Angeles 12, California.

The offense was failing to submit to induction, U.S.C., Title 50 App., Sec. 462—Selective Service Act, 1948.

On April 7, 1953, after a verdict of Guilty the court sentenced the appellant to four years confinement in an institution to be selected by the Attorney General.

I, J. B. Tietz, appellant's attorney being authorized by him to perfect an appeal do hereby appeal

to the United States Court of Appeals for the Ninth Circuit from the above stated judgment.

/s/ J. B. TIETZ,
Attorney for Appellant.

Receipt of copy acknowledged.
[Endorsed]: Filed April 7, 1953. [8]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

The following are hereby designated as the record which is material to the proper consideration of the Appeal filed by William Joy Batelaan in the above-entitled cause.

1. Indictment.
2. Reporter's Transcript (as requested of Reporter).
3. All Exhibits in evidence or proferred are to be transmitted to the Court of Appeals as provided by Rule 75 (O) R.C.P. and Rule 11 of the U.S.C.A. for the Ninth Circuit.
4. Notice of Appeal.
5. Designation of Record.
6. All Stipulations.

/s/ J. B. TIETZ,
Attorney for Appellant.

Affidavit of Service by Mail attached.
[Endorsed]: Filed June 29, 1953. [10]

In the United States District Court, Southern District of California, Central Division

No. 22574-Crim.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WILLIAM JOY BATELAAN,
Defendant.

Honorable William C. Mathes, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiff:
WALTER S. BINNS,
United States Attorney, By
MARK P. ROBINSON,
Asst. U. S. Attorney.

For the Defendant:
J. B. TIETZ, ESQ.

Thursday, March 26, 1953, 1:30 P.M.

The Court: No. 22574, United States vs. William Joy Batelaan. Is it stipulated the defendant is present, gentlemen?

Mr. Tietz: Yes, your Honor.

Mr. Robinson: So stipulated.

The Court: I notice there is in the file a waiver of trial by jury and a waiver of special findings of

fact which was approved and filed January 5 last. I assume the defendant desires to proceed without a jury.

Mr. Tietz: Yes, your Honor.

The Court: Very well.

Mr. Robinson: Your Honor, I noticed in the Batelaan exhibit folder there is already marked for identification a photostatic copy of the Selective Service file which is marked Government's Exhibit 1 for identification and a stipulation signed by the defendant and the Government and the defendant's counsel which is now marked Government's Exhibit 1-A for identification. The Government now offers each of those exhibits in evidence and asks that they be marked as they are now marked in evidence.

The Court: Is there objection?

Mr. Tietz: None.

The Court: Received into evidence. The Selective Service file is Exhibit 1 and the stipulation is Exhibit 1-A [3*] in evidence.

The Clerk: Government's Exhibit 1 in evidence and Government's Exhibit 1-A in evidence.

Mr. Robinson: The Government rests, your Honor.

Mr. Tietz: The defendant desires to make a motion for judgment of acquittal and has several points that he wishes to urge upon the court.

May counsel have one of the two copies of the file to make certain of the pagination? May I have the one the clerk had and the court can follow me on the original?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Court: I have a photostatic copy, which is Exhibit 1 for identification. Do you have another, Mr. Clerk?

Mr. Tietz: Is that the one of Batelaan?

The Clerk: This is the Johnson.

The Court: You may have the file, Mr. Tietz. Mr. Clerk, will you hand counsel Exhibit 1?

Mr. Tietz: I will use Mr. Robinson's and the court can follow better with the exhibit.

The Court: Very well.

Mr. Tietz: There are just two or three documents that I wish to take another glance at.

Mr. Robinson: With the court's permission, I am going to stand up here and watch.

The Court: You may.

Mr. Tietz: I wish to verify what my notes showed, your [4] Honor. The first point is——

The Court: Before you proceed, I notice that the stipulation is not dated, is not signed by counsel or the defendant. It apparently was handed to the clerk and intended to be later signed. I notice that after the court has endorsed an approval on the stipulation.

Mr. Robinson: I am sorry.

The Court: Will you date and sign it and permit the defendant to sign it?

Mr. Tietz: The first point, your Honor, is that the exhibit shows a fatal procedural defect, page 38. That is the crucial order in the whole Selective Service System.

The Court: 38 in Exhibit 1?

Mr. Tietz: Yes, sir. This page is 38, entitled "Order to Report for Induction."

The Court: You mean it appears to be signed by the clerk?

Mr. Tietz: Well, not even that; something called "Asst. Co-ordinator." Even the "Clerk" is scratched out.

My argument on it is this:

(Argument omitted from transcript upon request of counsel.)

The Court: We will take the afternoon recess at this time of five minutes.

(Short recess.) [5]

The Court: In No. 22574, United States vs. Batelaan, is it stipulated, gentlemen, the defendant is present?

Mr. Tietz: Yes, sir.

Mr. Robinson: So stipulated, your Honor.

The Court: Anything further on the motion for judgment of acquittal?

Mr. Robinson: Yes, your Honor. I would like to state something in response to Mr. Tietz's argument.

(Continued argument of counsel omitted from transcript by request of counsel.)

The Court: Is there any other ground on the motion for judgment of acquittal?

Mr. Tietz: Yes, sir. The defendant has other points that I would like to present. It will be observed from page 39 of the exhibit (Government's

1) that this defendant conveyed to the Local Board by doctor's certificate the fact that he had a pregnant wife. Under the regulations, a registrant who has a pregnant wife is entitled to be considered as one who has a child.

Now, I will be quick to concede that there is a deadline imposed by that very regulation that states or says that if the doctor's certificate comes in after the order to report for induction, as it did here a few days later, that it shall not be counted. So that the point I am making is this: That that regulation is unfair and the court should so hold; [6] that the intent of Congress was that fathers should be kept at home supporting the families and not put into the service.

(Argument omitted by request of counsel.)

Now, I have some other points that I would like to have the court consider. One I will make merely for the record because I know your Honor's attitude on it, and that is that this man was obviously classified when a quorum was not present. The classification act and the minutes of action show that. I won't go further than that because I know that your Honor has not considered that a meritorious point in the past.

Then the defendant submits to your Honor that the action of classifying him was arbitrary in that his evidence was for that of a conscientious objector. The hearing officer himself, just as in the preceding case, your Honor, made a I-A-O recommendation, but that consideration was not given by the Attor-

ney General nor by the appeal board itself. So that I say that that is an arbitrary action contrary to the evidence.

The next point is that the Attorney General has a mistaken concept of the law. He says that, because this individual believes in force, therefore he is within the prescribed class that does not have scruples against war. I have argued that to your Honor before so I won't go further on that.

Then, of course, the Nugent point, that the FBI report should be in the file. And then—well, that comprises the [7] points I wish to make at this time.

The Court: The motion for judgment of acquittal will be denied.

Mr. Tietz: The defendant will take the stand.

Defendant's Case in Chief

WILLIAM JOY BATELAAN

the defendant herein, called as a witness in his own behalf, being first sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: William Joy Batelaan.

The Court: Do you pronounce your name Batelaan?

The Witness: Batelaan.

Direct Examination

By Mr. Tietz:

Q. Mr. Batelaan, I am going to place before you Government's Exhibit 1 and ask you to look at page 24.

(Testimony of William Joy Batelaan.)

Has the clerk the exhibit that can be placed before the witness? The court has the other one?

The Court: The clerk will place Exhibit 1 before the witness.

Q. (By Mr. Tietz): You are reading the summary of your personal appearance hearing before the Local Board, are you not, Mr. Batelaan?

A. It looks like it.

Q. Have you finished reading your summary?

A. Not yet. Yes, sir.

Q. At that hearing did one of the board members say anything to you about his son being in the army? A. That is correct.

Q. What was that statement?

A. He told me that he had a son in the army and he didn't see why I couldn't be in the army, too.

Q. Did you attempt to bring them in new evidence or further evidence?

A. Yes, I did. I brought my brother-in-law down to the Local Board that day and had my brother-in-law converse with them.

Q. What was he supposed to do?

Mr. Robinson: Your Honor, I object to that question as to what he was supposed to do.

Q. (By Mr. Tietz): What was he prepared to do?

The Court: That means for what purpose did he bring him?

Mr. Tietz: Yes, that is it.

A. I brought my brother down there as suffi-

(Testimony of William Joy Batelaan.)

cient evidence to have him go in to the Local Board with me and help me quote Scriptures from the Bible to the Local Board, and to further prove that I was a conscientious objector, since he was a minister.

Q. Why was he able to do this better than you or to [9] aid you in this?

Mr. Robinson: I object to that as calling for a conclusion of this witness.

The Court: Do you mean why did the witness consider him better able to?

Mr. Tietz: Yes, sir.

The Court: Overruled.

Q. (By Mr. Tietz): Does he have some official position in your Company, or does he have some special learning or some special knowledge about you?

A. Well, he has been my brother-in-law ever since 1947. I figured that he would have a better understanding of my position than anybody that I knew.

Q. What happened when you brought him there?

A. He was refused to enter into the Local Board with me.

Q. Did you tell them why you brought him there? A. I told them that.

Mr. Tietz: You may cross-examine.

(Testimony of William Joy Batelaan.)

Cross-Examination

By Mr. Robinson:

Q. Mr. Batelaan, turning to page 24 of Government's Exhibit 1, you have read it previously here in court, have you not? Have you read it, Mr. Batelaan? A. Yes. [10]

Q. Is there any information which you presented to the Local Board on the hearing, the personal appearance held September 18, 1951, which does not appear in some form in this summary on page 24? A. Yes.

Q. Would you tell the court what that information was?

A. That information was when he stated that his son was in the army and he didn't see why I shouldn't be in the army.

Mr. Robinson: Your Honor, I move to strike that answer as not being responsive to the question. The question I asked Mr. Batelaan was: Did you present any information to the Board on your personal appearance which does not appear in this summary?

The Court: Do you oppose the motion to strike?

Mr. Tietz: I beg pardon?

The Court: Is the motion to strike as non-responsive opposed?

Mr. Tietz: No.

The Court: Granted. Do you understand the question, Mr. Batelaan?

The Witness: I wish he would explain it.

(Testimony of William Joy Batelaan.)

The Court: I suggest you restate it.

Mr. Robinson: Yes, your Honor.

Q. Going back to your personal appearance on September [11] 18, 1951, while you were there in front of the Board did you present any information to the Board which does not appear in this summary on page 24?

A. Well, I also brought my Bible with me and I wanted to quote Scriptures to them but they refused to hear what I had to say, and that is not in my file.

Q. In other words, you did not quote the Scriptures to them, is that right?

A. No, I was not able to.

Q. Outside of this instance that you have reference to about the Bible did you tell them any other information that does not appear on page 24?

A. No.

Mr. Robinson: You did not?

The Court: Did you intend or seek to quote to the Local Board any Scriptures which are not quoted or attached to the Special Form for Conscientious Objector? Did you have other Scriptures, or are all of the scriptural references on which you relied at that time quoted in your Selective Service Questionnaire? Your answer?

The Witness: Yes, sir.

The Court: I want to be sure you understand me.

The Witness: Yes.

The Court: You know you had in your file at

(Testimony of William Joy Batelaan.)

that time your Special Form of Conscientious Objector to which you [12] attached certain pages you will see there in Exhibit 1——

Mr. Robinson: Page 17.

The Court: ——in which you quoted the Scriptures at some length. Do you see that page 17 or thereabouts in Exhibit 1?

The Witness: Yes, sir.

The Court: Now, my question, Mr. Batelaan, is whether you, at the time of your personal appearance before the Local Board, purposed or intended or attempted to cite or refer the Local Board to any Scriptural references not given in your conscientious objector form?

The Witness: Yes, I did have other Scriptures I wanted to quote to them.

The Court: What?

The Witness: Well, there is quite a few Scriptures I had in mind to quote to them. It would be kind of hard for me to say right now what they would be, but if I had a Bible, I am sure I could quote them to you now. I haven't had time to look them up. That is why I had my brother-in-law there, to help me find the Scriptures in the Bible so I wouldn't have to waste too much of the Board's time.

Q. (By Mr. Robinson): How long were you before the Local Board at your personal appearance, do you recall? A. About 10 minutes.

Q. About 10 minutes?

A. That is right. [13]

(Testimony of William Joy Batelaan.)

Q. At the time that you attempted to read from the Bible what did you say to the Board and what, if anything, did any of the members of the Board say to you?

A. Well, I told them that I would like to cite from the Bible, and they just kept going to different questions. They didn't seem to be paying attention to what I had to say.

Q. You mean they did not specifically say "You can't read from the Bible," is that right?

A. No, they didn't say that, but they were cutting me off.

Q. They were what?

A. They were cutting me off.

Q. In other words, you said, "I would like to cite from the Bible"? A. That is right.

Q. And then they would ask some questions, is that right? A. Yes.

Q. That had nothing to do with the Bible, is that right? The question wouldn't have anything to do with the Bible?

A. Yes, the question would have something to do with the Bible.

Q. It would? A. Yes.

Q. Can you tell the court, just as best you can, what [14] the conversation was that went on between you and the Board at this time?

A. It would be kind of hard. It was at least a couple of years ago.

Q. I mean to the best of your recollection.

(Testimony of William Joy Batelaan.)

A. Well, they asked me if I worked at Lockheed——

Q. No. I mean with reference to the Bible, because you wanted to cite something from the Bible. I am trying to find out in what way they cut you off.

A. Well, they just asked me different questions such as—well, I tried to quote from the Bible and they kept—well, "Was your Mother a Jehovah's Witness? And was your father?" and they would just cut me off. They just would keep going from one question to another.

Q. At the termination of your appearance there what was said? In other words, did you tell them you had anything more to say?

A. No. I told them I didn't have any more to say, because they didn't seem to be very interested in what I had to say, anyway.

Q. In other words, they did ask you if you had anything more to say, is that correct?

A. That is correct.

Q. At this time you did not cite these new sections of the Bible, is that right? [15]

A. That is right.

Q. At any time during this appearance did you specifically tell any member of the Board that you had sections that you wished to quote from the Bible which did not appear in your file already?

A. No, I didn't.

Mr. Robinson: All right. I have no further questions.

Mr. Tietz: No redirect.

The Court: You may step down, Mr. Batelaan.

Mr. Tietz: The defense would like the FBI file of this defendant.

Mr. Robinson: Your Honor, the United States Attorney has in custody in court, under seal, the Federal Bureau of Investigation or a copy of the Federal Bureau of Investigation report on William Joy Batelaan, which report is dated on January 4, 1952. I am going to hand it to the clerk under seal and ask that it be marked Defendant's Exhibit A for identification.

The Court: Does the Attorney General claim the privilege under the order? What order?

Mr. Robinson: He does, your Honor, under Order 3229. We are prepared to enter into a stipulation concerning the file, if your Honor pleases.

The Court: Very well, the clerk will mark the envelope containing the report as Exhibit A for identification. [16]

Mr. Robinson: May it be stipulated that the exhibit which is now marked Defendant's Exhibit A for identification is a copy of report made by the Federal Bureau of Investigation concerning the conscientious objector claims of the defendant Batelaan?

Secondly, that the Defendant's Exhibit A is a true and accurate copy of the complete investigative report made by the Federal Bureau of Investigation concerning the conscientious objector claims of this defendant?

Third, that the Defendant's Exhibit A for iden-

tification, or a true copy thereof, was forwarded by the representative of the Federal Bureau of Investigation, so designated, for the purpose, to the office of the United States Attorney?

Fourth, that the defendant's Exhibit A for identification was forwarded by the office of the United States Attorney to the hearing officer designated by the Department of Justice to hear the conscientious objector claims of the defendant Batelaan, as provided in Section 6(j) of the Universal Military Training and Service Act and Selective Service Regulation 1626.25?

And fifth, that the Defendant's Exhibit A for identification is the investigative report that was in the possession of the hearing officer prior to the hearing held to determine the validity of the conscientious objector claims of the defendant Batelaan, and was used and referred to by the [17] hearing officer in the recommendation he prepared and sent to the Department of Justice concerning conscientious objector claims of the defendant Batelaan, as provided in Section 6(j) of the Universal Military Training and Service Act and Selective Service Regulation 1626.25?

And sixth, that Defendant's Exhibit A for identification is a true copy of any and all Federal Bureau of Investigation reports ever made on this defendant concerning his conscientious objector claims, or which was ever in the possession of the Federal Bureau of Investigation or the United States Attorney?

Mr. Tietz: We accept that stipulation.

The Court: Very well.

Mr. Tietz: We ask that this Exhibit A be admitted into evidence and that we be permitted to inspect it and use it in our defense.

Mr. Robinson: Your Honor, we object to the admission of Exhibit A in evidence on the grounds that there is no proper foundation laid for its entrance, and we object to the inspection of the defendant on the grounds that the Attorney General has claimed the privilege of confidential documents under the Attorney General's order 3229.

The Court: The court will make an in camera inspection of Exhibit A for identification before ruling upon the motion and offer of the defendant.

Is there any contention here that this defendant made any [18] request of the hearing officer?

Mr. Tietz: There is not.

The Court: The Government's objection that the Defendant's Exhibit A for identification is irrelevant and immaterial to any issue in this case is sustained. For that reason the document will not be received into evidence.

The motion of the defendant for inspection of the exhibit by the defendant and his counsel is denied upon the ground that, in the view of the court from an in camera examination of the document itself, the public interest in the preservation of the confidential character of such executive communication, pursuant to regulations issued under authority of Section 22 of Title 5 of the United States Code, outweighs any possible evidentiary value of the exhibit to the defendant in this case.

The clerk will seal the Defendant's Exhibit A for identification and retain it in his custody, under seal, pending further order of the court. And the court will now order that, upon application of the appellant in any appeal that may be taken in this case, Defendant's Exhibit A for identification, under seal, will be transmitted as part of the record on appeal to the Appellate Court for examination by that court to determine whether or not this court erred in refusing to receive the exhibit in evidence and in refusing to permit the defendant or his counsel to make an inspection of it. [19]

Mr. Tietz: The defendant rests his case.

The Court: Any rebuttal?

Mr. Robinson: Your Honor, I do not know whether it would be in the nature of rebuttal; in fact I am sure it is not; but I am inclined to ask the court that the Government be permitted to reopen the case for the purpose of presenting evidence in chief which I feel might clear up this matter as to whether or not there was a proper order to report.

Mr. Tietz: We have no objection.

The Court: Do you wish to reopen the case in chief?

Mr. Robinson: Yes, I do, your Honor.

The Court: Is that your motion?

Mr. Robinson: That would be our motion. However, I should accompany the motion by a statement that we should not be prepared to continue with the reopening today.

Mr. Tietz: Perhaps, your Honor, a proffer of

testimony can be made by the Government and I may agree that that would be the testimony, if it were presented, and then we could proceed with our arguments.

The Court: Very well. What is your offer of proof?

Mr. Robinson: Your Honor, I would offer to prove that if a member of the Local Board No. 83, 239 East Olive Avenue, Burbank, California, were called and testified as a witness, that he would testify that the selection of William Joy Batelaan as a subject for induction was participated in [20] by him in his official capacity as a member of the Local Board, and that in all phases of the selection of Mr. Batelaan the Local Board complied with the regulations; that the Order to Report for Induction, SSS Form No. 252 was sent to this registrant pursuant to selection of Mr. Batelaan as a subject for induction by the Board.

I think that would be about the extent of the testimony, your Honor.

Mr. Tietz: I would stipulate that that would be the testimony of the board member if called.

The Court: Will it be stipulated that the board member named will be deemed, for the purposes of this trial, to have been called by the Government upon its case in chief, to have been sworn and to have testified?

Mr. Tietz: Yes, your Honor.

Mr. Robinson: So stipulated, your Honor.

The Court: Pursuant to the stipulation, the Government's case in chief will be reopened and

the testimony thus stipulated will be received. Does the Government now rest?

Mr. Robinson: The Government now rests, your Honor.

The Court: Any further defense?

Mr. Tietz: None.

The Court: Any rebuttal?

Mr. Robinson: No rebuttal, your Honor.

The Court: Both sides rest? [21]

Mr. Robinson: Both sides rest.

The Court: Argument?

Mr. Tietz: The defendant would like to renew all the points made by it as grounds for a judgment of acquittal that were made at the close of the Government's case.

I would like to spend a few minutes arguing further just one of them before going into the points that have been brought out by the defense testimony.

The matter that the defendant would like to argue a bit further is that the state of evidence now does not disclose any delegation of authority by the Board to this individual called "Assistant Coordinator."

(Argument omitted from transcript upon request of counsel.)

The points that the defense now wishes to add to all the other points that were grounds for a judgment of acquittal is that the testimony now shows that at the personal appearance hearing there were denials of due process in the following three respects:

The registrant was denied the opportunity to present new evidence, further evidence, in the form of his brother-in-law.

(Argument omitted.)

The next thing they did at the personal appearance hearing which we submit was a denial of due process, that [22] when he wanted to give them what he said was "new evidence" to support his claim and to support his argument—because he can support his argument as well as his claim by Scriptural references—he was prevented from doing that by the attitude of the Board in immediately asking him other questions. And when the court asked the witness on that, at first there was some confusion apparently in the witness' mind, but his definite answer was that they kept him from presenting new matter, not merely discussing or arguing or pointing out, but prevented him from presenting new matter.

The Court: The motion for a judgment of acquittal is denied. For the reasons stated in the Johnson case, No. 22596, there is a factual basis for the classification.

Mr. Tietz: Might I have a word, your Honor, though I don't like to interrupt your Honor's train of thought? That the cases hold that even though there is a factual basis, the court must make a finding, if the court can make a finding, that there has not been any denial of due process.

The Court: I make that finding impliedly. As

I view it, only procedural irregularities that affect the substantial rights of a registrant are such as might be held to invalidate the classification.

Here, again, this defendant, by his answer to question 5 in the Selective Service form respecting the use of force, provides a specific point, along with other material in the [23] file for the attorney of the Department of Justice to make the recommendation he did to the appeal board and undoubtedly furnished the basis for the appeal board's determination.

The Order to Report for Induction is, as stated, not signed by a member of the Board. It is presumably a valid order. If the defendant had treated it as an invalid order and had refused to report for induction, some interesting question might be presented. But here, he responded to the order, presumably valid, and after responding to the order he refused to submit to induction.

Mr. Tietz: Of course your Honor has in mind the decision that you must report or lose all his grounds for defense in court.

The Court: Yes, I have it in mind. But, if he wanted to stand upon the ground that the order itself was an invalid order, was not validly issued by reason of the want of authority of the individual issuing it, he might be in a stronger position than if he had defied the order entirely.

Mr. Tietz: I see your point.

The Court: That is wholly aside, though, as I view it, Mr. Tietz. There is basis in fact for his classification. There is no showing of any denial of procedural due process, no procedural irregu-

larity of any kind that I find that could have affected the substantial rights of registrant or could have affected his classification in any way. The [24] classification is valid and that constitutes that he is guilty of the charge and must be so found.

Is there any occasion to order a presentence investigation report in this case?

Mr. Tietz: I would not think so, your Honor. The defendant did say to me he would like a few weeks. I told him that I had some implication in these FBI point cases that those who wished to take an appeal would be permitted to be at large on a bond; and I told him that there would not be any reason why this coming Tuesday could not be as good a time as any to have him sentenced.

The Court: Is March 31st at 10:00 o'clock agreeable as the time for sentence?

Mr. Tietz: On my advice, he says, "Yes."

The Court: Very well. Is the defendant at liberty on bail?

Mr. Tietz: Yes, sir.

The Court: His bail will be continued pending sentence. And you may remain at liberty pending sentence, Mr. Batelaan, and you are instructed to return here next Tuesday morning, March 31st next, at 10:00 o'clock for sentence. Do you understand the time?

The Defendant: Yes, sir.

The Court: Very well. [25]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the

United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings as specified by Defendant's counsel, had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 14th day of July, 1953.

/s/ ALBERT H. BARGION,
Official Reporter.

[Endorsed]: Filed July 16, 1953.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 15, inclusive, contain the original Indictment, Waiver of Trial by Jury and of Special Findings of Fact; Judgment and Commitment; Notice of Appeal; Designation of Record on Appeal; and two Orders Extending Time to Docket Appeal and a full, true and correct copy of Minutes of the Court for December 8, 1952, March 26 and April 7, 1953, which, together with the original exhibits and reporter's transcript of proceedings on

March 26, 1953, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 28th day of July, A.D. 1953.

[Seal] EDMUND L. SMITH,
Clerk,

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13939. United States Court of Appeals for the Ninth Circuit. William Joy Batelaan, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed July 29, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 13939

WILLIAM JOY BATELAAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

I.

Classification of appellant in Class I-A was arbitrary and without basis in fact.

II.

Appellant was denied due process of law in connection with his personal appearance hearing before the local board, on each of the following grounds:

First: one of the classifying board members demonstrated that he was motivated by a disqualifying prejudice.

Second: appellant was prevented from introducing new evidence.

III.

The classification action was motivated by and was based on a misconception of the law, namely, that a belief in the use of force disqualified a registrant from being classified in Class I-O.

IV.

The plaintiff had not met its burden of proof to show that the classification action had been validly made at a legal meeting of the board.

V.

The plaintiff had not met its burden of proof to show that the Order to Report for Induction had been validly executed.

VI.

Selective service regulation § 1622.30 (c) (2) is unreasonable and contrary to the intent of Congress in that it, in its application to appellant, unfairly deprived appellant of a III-A deferred classification.

VII.

The investigative reports of the Federal Bureau of Investigation concerning the conscientious objections of the appellant were required to be placed in the selective service file for access by the appellant and by the selective service appeal board, and the failure to so provide them and to give them access to said reports was a violation of the Act, the Regulations and the due process clause of the Fifth Amendment to the United States Constitution.

VIII.

The Hearing Officer deprived the appellant of a full and fair hearing and procedural due process of law by failing to give to the registrant a fair, full, and adequate summary of the adverse and unfavor-

able evidence appearing in the FBI report so that the registrant could answer to the unfavorable evidence.

/s/ J. B. TIETZ,
Attorney for Appellant.

[Endorsed]: Filed September 9, 1953.

[Title of Court of Appeals and Cause.]

ADOPTION OF DESIGNATION

Appellant hereby adopts the Designation of Record heretofore filed in the District Court.

/s/ J. B. TIETZ,

[Endorsed]: Filed September 9, 1953.

No. 13939

United States Court of Appeals

FOR THE NINTH CIRCUIT.

WILLIAM JOY BATELAAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York
Counsel for Appellant

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No. 13939

United States Court of Appeals

FOR THE NINTH CIRCUIT.

WILLIAM JOY BATELAAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

JURISDICTION

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Southern District of California, Central Division. [3-4][1] The district court made no specific findings of fact. These

[1] Numbers appearing in *brackets* herein refer to pages of the printed Transcript of Record filed herein.

were waived. No reasons were stated by the court in writing for the judgment rendered. The judge declared orally that the motion for judgment of acquittal was denied. He convicted the appellant; he made no discussion of the principles of law involved in the case. [27-28, 29]

The trial court found appellant guilty. Title 18, Section 3231, United States Code, confers jurisdiction in the district court over the prosecution of this case. The indictment charged an offense against the laws of the United States. [4] This Court has jurisdiction of this appeal under Rule 37(a) (1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law. [6-7]

STATEMENT OF THE CASE

The indictment charged appellant with a violation of the Universal Military Training and Service Act. It was alleged that after appellant registered and was classified, he was ordered to report for induction. It is then alleged that on or about October 13, 1952, appellant did knowingly fail and refuse "to be inducted into the armed forces of the United States as so notified and ordered to do." [4]

Appellant pleaded not guilty. At the trial he waived the right of trial by jury. Also the findings of fact and conclusions of law by the trial judge were waived. [8] Appellant subpoenaed the production of the secret FBI investigative report, made pursuant to Section 6(j) of the act. The Government produced the FBI report at the trial. [21] The defendant offered it into evidence. [21] The authenticity and use of the FBI report were stipulated. [21-22] It was then offered into evidence. [23] The trial court made an inspection *in camera* of the FBI report. He then excluded it from evidence. [23] The report was ordered sealed as an exhibit. [24] At the close of the evidence appellant renewed his motion for judgment of acquittal. [9-13, 26] The motion for judgment of acquittal was denied. [27]

The trial court found no violation of the procedural rights of the appellant by the draft board and declared there was basis in fact for the classification. [27] Notice of appeal was timely filed. [6-7] The transcript of the record, including statement of points relied upon, has been timely filed in this Court.

THE FACTS

Appellant was born on April 15, 1932. (1)[2] Batelaan registered with his local board on July 11, 1950. (2) On April 16, 1951, he was mailed a classification questionnaire. (3)

The appellant filled out the classification questionnaire properly. He returned it and filed it with the local board on April 30, 1951. (5) In the questionnaire he showed his name and address. (6) He did not answer that he was a minister of religion. (7) He stated that he worked for the Lockheed Aircraft Corporation in Los Angeles as an assembler, working on the structure of aircraft. (8) He showed that he earned $1.15 per hour and that he worked 40 hours per week. (9)

He showed that he attended 6 years of elementary school, 3 years in junior high school and 2½ years in high school. (10) He showed that he was born in Cleveland, Ohio. (10) He signed the conscientious objector blank, Series XIV of the classification questionnaire. (11)

The local board, on May 2, 1951, mailed to him the conscientious objector form. (12) He filled out the form and filed it with the local board on May 8, 1951.

He signed Series I (B). (15) He showed that he believed in the Supreme Being. He described the nature of his belief. He showed that his belief in the Supreme Being involved duties superior to those arising from any human relation.

[2] **Numbers appearing in *parentheses* herein refer to pages of the draft board file which are written in longhand at the bottom of each page and circled.**

(15) He showed that as a Christian he could never take sides in the wars between the nations. He emphasized that his citizenship was in heaven and that by reason thereof he owed his obligations to Almighty God, Jehovah. (17) He showed that he was for the kingdom of Almighty God and that all worldly governments were against it. He emphasized that the whole world, in his opinion, laid under the influence of the evil one, Satan the Devil. (17)

He then emphasized that his religious belief forbade indulgence in war between nations. He relied upon scripture. He stated that he believed what the apostle Paul said, that his weapons of Christian "warfare are not carnal." (17)

He explained that he became interested in studying the Bible in the year 1946. He showed that his parents belonged to the Dutch Reformed Church. He said that he noticed that his parents were unable to give any explanation or show any understanding concerning the Bible. He showed that he began Bible study for himself and thereafter received Bible helps from Jehovah's Witnesses and the Watchtower Bible and Tract Society. He showed that, through Bible study in his home each week and attending two Bible study classes held at the church, he became familiar with the beliefs of Jehovah's Witnesses. (16, 17)

He named Mr. Piesel of San Fernando as the one upon whom he relied most for religious guidance. (16) He showed that he was not a pacifist. He emphasized that he believed in the use of force for self-defense and against those who fight against his Christian brothers. (17) He cited a number of ancient Biblical examples of using force. He underscored that Jehovah's Witnesses have the right to defend themselves against assault. He said that in doing this they had God's approval. (18)

Batelaan showed that he had consistently been preaching what he believed since December 15, 1946. He quoted Isaiah 61:1-3. He said that if he failed to carry out the commandments of God it would mean everlasting death to him. He relied upon this course of action as consistently describing

his behavior that showed the depth of his religious convictions. (18) He said that he had given public expression to his views by preaching the gospel. (16, 18)

Batelaan listed the schools that he had attended and the jobs that he had had. (16) He then listed his residences. (19) He gave the names of his parents. (19) While he did not show that his parents belonged to any religion in the conscientious objector form, he had previously stated in a separate statement that they belonged to the Dutch Reformed Church. (17)

He showed that he had been a member of the Watchtower Bible and Tract Society since 1946. He identified his local church and showed that Piesel was the presiding minister of the congregation. He showed that the Watchtower Bible and Tract Society did not state or force people to say whether they should or should not go to war, but left it to each individual to do his own choosing based on his belief in the Bible. (19)

He showed he was a member of a labor organization. (19) He listed references. (20) He then signed the conscientious objector form at the proper place. (20)

A I-A classification was given to Batelaan on September 4, 1951, by the local board. It found that he was liable for full military service. He was denied his conscientious objector claim. (12) On receipt of notice he wrote a letter to the local board requesting an appeal. This was filed on September 12. (12, 21) He also requested a personal appearance on September 14, 1951. (12, 22) The local board set the personal appearance for September 18, 1951. (12, 23) He appeared at the time fixed for the hearing. (12)

At the personal appearance appellant showed that he was one of Jehovah's Witnesses. He emphasized that he was attending the Theocratic Ministry School at the local church one night each week. He said that he was studying for the ministry. He testified that he forgot to put in the questionnaire that he started in February of 1951. He told the board that he joined the church in 1945. He said that

his father was still a church member, presumably of the Dutch Reformed Church, and that his mother was dead. (24)

The local board asked him about his employment at the Lockheed Aircraft works. He stated that working there was consistent with his conscience. He said any job that he would get "these days," such as farming and other jobs, "would be working towards the war"; therefore since he "must work to eat, and the job at Lockheed is only to get money to live on," the job did not interfere with his conscience. (24)

The local board after the personal appearance continued him in I-A. He was mailed notice of his reclassification. (12, 24) The file was sent to the board of appeal. The board of appeal forwarded the file to the Department of Justice for an inquiry and hearing on his conscientious objector claim. (12)

The Department of Justice conducted a secret FBI investigation. A report was made by the FBI to the Department of Justice. The Department of Justice in turn forwarded the FBI report to the hearing officer. The hearing officer had the FBI report before him and used it. He referred to it in the preparation of his recommendations that were adopted by the Department of Justice and forwarded to the appeal board. [21-22]

A hearing was conducted on July 1, 1952. Appellant appeared before the hearing officer. (32) The hearing officer made a report to the Department of Justice on July 7, 1952. (32-33) The hearing officer's report was brief. It referred to his background and education. The hearing officer emphasized his employment as a riveter working on war planes at Lockheed. He found that he was a member of Jehovah's Witnesses.

A number of different items were listed by the hearing officer as basis for the denial of the conscientious objector claim. One was that he found in the FBI report appellant did not put forth an adequate effort in the ministry school of Jehovah's Witnesses. Another was that he was not one of Jehovah's Witnesses while living in Cleveland, before

moving to California, because he was not baptized until two months after he got to California. The hearing officer, however, found that Batelaan had been active since 1946 in Jehovah's Witnesses. He relied upon the fact that Batelaan had at one time in his youth been a boy scout, while living in Cleveland. He found that Batelaan was induced to become one of Jehovah's Witnesses by his brother-in-law who helped him prepare his draft papers. (33) He emphasized the fact that Batelaan was not a pacifist. (34)

The conclusion of the hearing officer was to deny the full conscientious objector status and grant to Batelaan only partial conscientious objector status. He found that Batelaan should be classified as a conscientious objector, willing to do noncombatant military service in the armed forces. The reason for this, according to the hearing officer, was because appellant was willing to use force in self-defense and in defense of others and that he was employed in war work at Lockheed. He said it was the result of Batelaan's own philosophy. He relied also on the fact that Batelaan was not born in the religion of Jehovah's Witnesses. Because of all these things he found appellant not to be sincere. (34) He recommended the I-A-O classification. (34)

Along with his report the hearing officer sent some certificates and affidavits submitted by the appellant to him at the hearing. These were signed by Harold P. Digre, Lloyd K. Stewart, Frank J. Picel and William Zumwalt. These persons all certified to the sincerity of Batelaan and his *bona fide* membership and activity as one of Jehovah's Witnesses. (27-28)

The Assistant Attorney General made a recommendation to the appeal board on July 24, 1952. He did not agree with the hearing officer. He insisted that Batelaan was not entitled even to a partial conscientious objector's classification. He contended that appellant should be denied all benefits of the law relating to conscientious objectors. The Attorney General relied upon the answer of appellant to

question number 5, in Series II of the special form for conscientious objector. (16, 17-18, 30)

The hearing officer said that the answer to this question showed that appellant was "not a pacifist" and because of this was not "opposed to participation in all forms of war." He recommended the denial of the claim for exemption as a conscientious objector. (30)

On July 29, 1952, the board of appeal classified appellant in Class I-A. The file was returned to the local board and he was notified of the classification. (12) He was given a physical examination and found acceptable. (12, 37) On October 1, 1952, appellant was ordered to report for induction October 13, 1952. (12, 38) He filed an affidavit of the pregnancy of his wife too late to gain a stay of induction. (12, 39-40) On October 14, 1952, he reported as ordered and refused to submit to induction. (12, 41, 42, 45)

QUESTIONS PRESENTED AND HOW RAISED

I.

The undisputed evidence showed that appellant possessed conscientious objections to participation in both combatant and noncombatant military service. He showed that these objections were based upon his sincere belief in the Supreme Being. He showed that his obligations to the Supreme Being were superior to those owed to the Government. He showed that his beliefs were not the results of political, philosophical, or sociological views, but that they were based solely upon the Word of God. (15-20)

The local board and the board of appeal denied the conscientious objector status. (12) The hearing officer made a report to the Department of Justice. (32-33) He recommended the I-A-O classification. (34) The Assistant Attorney General did not concur in this recommendation. He, for the Department of Justice, in turn recommended to the appeal board that Batelaan be denied all claims for classification as a conscientious objector. The basis for this recom-

mendation was that Batelaan was not a pacifist and therefore was not entitled to the full conscientious objector status.

The Attorney General, without any evidence whatever to support it, reached the false conclusion that Batelaan was willing to participate in some forms of war or at least he found that appellant was not opposed to participation in all forms of war. How this conclusion was reached is not apparent. He recommended against the granting of either conscientious objector classification. He suggested to the appeal board that appellant be classified in Class I-A. (30)

The appeal board followed the recommendation of the Assistant Attorney General and placed Batelaan in Class I-A. (35)

On the trial of this case a complaint was made of the classification given appellant by the appeal board and against the arbitrary, illegal and invalid recommendation by the Assistant Attorney General. [12-13, 26] The motion for judgment of acquittal was denied. [27]

The question here presented, therefore, is whether the denial of the claim for classification as a conscientious objector was without basis in fact and whether the recommendation of the Department of Justice and the classification given to appellant by the appeal board were arbitrary, capricious and without basis in fact.

II.

The conscientious objector claim of appellant was forwarded to the Department of Justice for appropriate inquiry and hearing. (12, 32) A complete investigation was made by the FBI before the case was referred to the Department of Justice for a hearing. [21-22] At the hearing the hearing officer had the secret FBI report before him and used it in making his recommendation to the Department of Justice without telling appellant about it. [21-22] Batelaan did not request the hearing officer to give to him the adverse or unfavorable evidence appearing in the FBI report. [23]

At the trial an appropriate demand was made for the production of the secret FBI investigative report. [21] It was produced and marked as defendant's Exhibit A for identification. [21] A stipulation was made as to the authenticity and use of the FBI report in the chain of administrative proceedings. (21-22) Appellant offered the FBI report into evidence. Objection was made to the production of the report and also the introduction of it into evidence. [21, 23] The trial court declared the FBI report to be irrelevant and immaterial to any issue and excluded it from evidence after an *in camera* inspection of it. (23) The FBI report is a sealed exhibit in this Court. (24)

The question here presented, therefore, is whether the appellant was illegally denied his right to have the use of the FBI report upon the trial to test and determine whether the report of the hearing officer to the Department of Justice and the recommendation of the Assistant Attorney General to the appeal board was illegal, arbitrary, capricious and contrary to the facts appearing in the FBI report that Batelaan was a *bona fide* conscientious objector, notwithstanding the report of the hearing officer and the recommendation of the Department of Justice.

SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motion for judgment of acquittal, duly made at the close of all the evidence.

II.

The district court erred in convicting the appellant and in entering a judgment of guilt against him.

III.

The district court committed reversible error in refusing appellant the right to use the secret investigative report at

the trial as evidence to determine whether or not the report of the hearing officer and the recommendation of the Attorney General to the board of appeal was illegal, arbitrary, capricious and contrary to the facts appearing in the FBI report that appellant was a conscientious objector.

SUMMARY OF ARGUMENT

POINT ONE

The board of appeal had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant, and it arbitrarily and capriciously classified him in Class I-A.

Section 6(j) of the act (50 U. S. C. App. § 456(j), 65 Stat. 83) provides for the classification of conscientious objectors. It excuses persons who, by reason of religious training and belief, are conscientiously opposed to participation in war in any form.

To be entitled to the exemption a person must show that his belief in the Supreme Being puts duties upon him higher than those owed to the state. The statute specifically says that religious training and belief does not include political, sociological or philosophical views or a merely personal moral code.

Section 1622.14 of the Selective Service Regulations (32 C. F. R. § 1622.14) provides for the classification of conscientious objectors in Class I-O. This classification carries with it the obligation to do civilian work contributing to the maintenance of the national health, safety, or interest.

The undisputed evidence showed that the appellant had sincere and deep-seated conscientious objections to participation in war. These objections were to both combatant and noncombatant military service. These were based on his belief in the Supreme Being. His belief charged him with obligations to Almighty God superior to those of the state.

The evidence showed that his beliefs were not the result of political, sociological, or philosophical views. He specifically said they were not the result of a personal moral code. The file shows without dispute that the conscientious objections were based upon his religious training and belief as one of Jehovah's Witnesses. The appeal board, notwithstanding the undisputed evidence, held that appellant was not entitled to the conscientious objector status.

The denial of the conscientious objector classification is arbitrary, capricious and without basis in fact.—*United States* v. *Alvies,* 112 F. Supp. 618; *Annett* v. *United States,* 205 F. 2d 689 (10th Cir.); *United States* v. *Graham,* 109 F. Supp. 377 (W. D. Ky.); *United States* v. *Pekarski,* — F. 2d — (2d Cir. Oct. 23, 1953); *Taffs* v. *United States,* — F. 2d — (8th Cir. Dec. 7, 1953).

POINT TWO

The court below committed reversible error when it refused to receive into evidence the FBI report and excluded it from inspection and use by the court and the appellant upon the trial of this case.

Upon the trial appellant subpoenaed the secret investigative report of the FBI. A motion to quash was made by the Government. This was denied. At the trial the court permitted the report to be marked for identification and received as a sealed exhibit after the trial court made an inspection of the exhibit. The trial court found the secret FBI report to be material but refused to permit it to be used as evidence.

The trial court committed grievous error when it refused to permit the exhibit to be used as evidence. It merely received the exhibit and permitted it to be marked for identification, and the court alone inspected it. It excluded the exhibit and permitted the report to come before

this Court in sealed form for the limited purpose of determining whether it was in error in excluding the exhibit.

No claim of privilege is applicable here. The Government waived its rights under the Order of the Attorney General, No. 3229, when it chose to prosecute appellant in this case. The FBI report was found to be material by the trial court. The judicial responsibility imposed upon the trial court to determine whether a fair and just summary was required to be given to the appellant overcomes and outweighs the privilege of Order No. 3229 of the Attorney General.—See *United States* v. *Andolschek,* 142 F. 2d 503 (2d Cir.); *United States* v. *Krulewitch,* 145 F. 2d 87 (2d Cir.); *United States* v. *Beekman,* 155 F. 2d 580 (2d Cir.); *United States* v. *Cotton Valley Operators Committee,* 9 F. R. D. 719 (W. D. La. 1949).

The Government must be treated like any other legal person before the court. It has no special privileges as the king did before the Stuart judges in England.—*Bank Line* v. *United States,* 163 F. 2d 133 (2d Cir.).

The secret investigative report was material. The trial court could not discard its judicial function in determining whether a full and adequate summary had been made of the secret investigative report without receiving the secret report into evidence and comparing it with the summary made by the hearing officer.—*United States* v. *Nugent,* 346 U. S. 1; *United States* v. *Evans,* 115 F. Supp. 340 (D. Conn. Aug. 20, 1953).

It is respectfully submitted, therefore, that the trial court committed error in excluding the FBI report from evidence and depriving appellant of the use of it upon the trial to ascertain whether the hearing officer made a full and fair summary of the secret FBI investigative report.

ARGUMENT

POINT ONE

The board of appeal had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant, and it arbitrarily and capriciously classified him in Class I-A.

The documentary evidence submitted by the appellant establishes that he had sincere and deep-seated conscientious objections against combatant and noncombatant military service, which were based on "his relation to a Supreme Being involving duties superior to those arising from any human relation." This material also showed that his belief was not based on "political, sociological, or philosophical views or a merely personal code," but that it was based upon his religious training and belief as one of Jehovah's Witnesses, being deep-seated enough to drive him to enter into a covenant with Jehovah and dedicate his life to the ministry.

There is no question whatever on the veracity of the appellant. The local board accepted his testimony. Neither the local board nor the appeal board raised any question as to his veracity. They merely misinterpreted the evidence. The question is not one of fact but is one of law. The law and the facts irrefutably establish that appellant is a conscientious objector opposed to combatant and noncombatant service.

In view of the fact that there is no contradictory evidence in the file disputing appellant's statements as to his conscientious objections and there is no question of veracity presented, the problem to be determined here by this Court is one of law rather than one of fact. The question to be determined is: Was the holding by the appeal board (that the undisputed evidence did not prove appellant was a conscientious objector opposed to both combatant and noncombatant service) arbitrary, capricious and without basis in fact?

There is absolutely no evidence whatever in the draft board file that appellant was willing to do military service. All of his papers and every document supplied by him staunchly presented the contention that he was conscientiously opposed to participation in both combatant and noncombatant military service. Never, at any time, did the appellant suggest or even imply that he was willing to perform any military service. He, at all times, contended that he was unwilling to go into the armed forces and do anything as a part of the military machinery.

The decision in *United States* v. *Alvies,* 112 F. Supp. 618, at pages 623-625, is applicable here. For the reasons there discussed the denial of the conscientious objector status here should be held to be without basis in fact.—See also *Dickinson* v. *United States,* No. 57, October Term 1953, Supreme Court of the United States, 346 U. S. —, decided November 30, 1953.

In situations similar to this the courts have uniformly held that the denial of the conscientious objector status is without basis in fact. (See *United States* v. *Konides,* No. 6216, District of New Hampshire, decided March 13, 1952, and *United States* v. *Konides,* No. 6264, District of New Hampshire, decided by Judge Woodbury, Circuit Judge, S. D., on June 23, 1953.) Copies of the opinions in these two cases accompany this brief. The *Konides* case was appealed to the National Selective Service Appeal Board twice. The board gave the I-A classification twice. After each classification there were orders to report for induction issued. Konides refused to be inducted twice, and each time an indictment was issued. Each time the indictments were dismissed because of the arbitrary denial of the conscientious objector status by the National Appeal Board.—See also *Annett* v. *United States,* 205 F. 2d 689 (10th Cir.); *United States* v. *Graham,* 109 F. Supp. 377 (W. D. Ky.); *United States* v. *Pekarski,* — F. 2d — (2d Cir., October 23, 1953.); *Taffs* v. *United States,* — F. 2d — (8th Cir. Dec. 7, 1953).

The documents filed by appellant showed that when ordered to take up arms and fight in Caesar's army of this world Jehovah's Witnesses raise their conscientious objections to quit worshiping and serving Jehovah and thereby render unto Caesar the things that are God's. They take this stand as ministers with conscientious objections notwithstanding the fact that they are not pacifists.

Their conscientious objection to rendering military service to Caesar and in Caesar's army is based solely upon the commands of God's Word, the Bible, because they are his ministers or ambassadors for the new world of righteousness. (2 Corinthians 5:20) These are, therefore, conscientious objections to the performance of military service, which are based on Bible grounds. They are not pacifists. They are ministers conscientiously opposed to the performance of military service and any other service as a part of the war efforts of the nations of the Devil's world. "We know that we are children of God, and that the whole world lies in the power of the evil one." (1 John 5:15, *Weymouth*) They are, therefore, conscientious objectors and ministers, or ministers with conscientious objections.

There is no Scriptural authorization for Jehovah's Witnesses to bear arms in the service of the armed forces of any nation. Based on such training and belief Jehovah's Witnesses have conscientious objections to rendering such service. These objections are conscientiously based upon the law of Almighty God. That law, which is supreme, commands the true Christian minister to maintain an attitude of strict neutrality toward participation in international, national or local conflicts. This strict neutrality required by the supreme law is enforced by the commands of God, which prohibit Jehovah's Witnesses from bearing arms or joining the armed forces of the nations of this world.

The fact that entering "Caesar's" armed forces is usually by conscription or forced service does not make it Scriptural. Regardless of whether the service is voluntary or by capitulation to commands, the situation is the same: the

Christian minister of Jehovah thus gets unscripturally involved in the affairs of the nations of this world. He who is a friend of the world is an enemy of God. (James 4:4) A Christian minister does not take a course of action that is at enmity with God. He must follow in the footsteps of the Lord Jesus Christ and keep himself unstained by the world. (1 Peter 2:21; James 1:27, *An American Translation*) This he does by faithfully sticking to his post of duty as a minister and ambassador of Jehovah. He does not abandon it to participate in the controversies of this world of Satan.

It is true that Jehovah's Witnesses, as Christian ministers of God, reside in all the nations of the world. That fact does not mean that they are mixed up with the political affairs or the international controversies of such nations. They are in the world but not of it. Jesus prayed to his Father, "I have given your word to them, but the world has hated them, because they are no part of the world just as I am no part of the world." (John 17:14, 16, *New World Translation*) Jehovah, through Christ Jesus, has taken them out of the controversies and affairs of this world and drawn them into the exclusive business of preaching the good news of Jehovah's kingdom, and, as ambassadors to the nations of the world, carrying his warning message of the coming battle of Armageddon. "As for us, our citizenship exists in the heavens, from which place also we are eagerly waiting for a savior, the Lord Jesus Christ."—Philippians 3:20, *New World Translation;* John 15:19.

Jehovah's Witnesses must not entangle themselves in the affairs of this world. This is because they are soldiers in the army of Jehovah. "Endure hardness, as a good soldier of Jesus Christ. No man that warreth entangleth himself with the affairs of this life; that he may please him who hath chosen him to be a soldier." (2 Timothy 2:3, 4) As such Christian soldiers they fight to get the message about God's kingdom to every creature.—Mark 16:15.

As such soldiers Jehovah's Witnesses fight lawfully with

all of the legal instruments, such as the constitutional rights, the statutory rights and other lawful rights granted to them by the nations of this world. They fight for freedom on the home front of the nation where they reside. They fight to defend and legally establish the good news before courts, ministers, officials, administrative boards and other agencies of governments. (Philippians 1:7, 16) They fight with weapons that are not carnal. These are the mouth, the faculty of reason, the process of logic and the law of the land. "For though we walk in the flesh, we do not wage warfare according to what we are in the flesh. For the weapons of our warfare are not fleshly, but powerful by God for overturning strongly entrenched things. For we are overturning reasonings and every lofty thing raised up against the knowledge of God, and we are bringing every thought into captivity to make it obedient to the Christ."—2 Corinthians 10:3-5, *New World Translation; Weymouth.*

In addition to the legal instruments that such Christian soldiers use, the great weapon that they wield among the nations of the earth is the "sword of the spirit, which is the word of God." (Ephesians 6:17) As soldiers of Jehovah and Christ they put on only the uniform that is prescribed by the law of God for Christian soldiers, his witnesses, to wear. That uniform is the armor of God. They have on the helmet of salvation and the breastplate of righteousness. They bear the shield of faith and wield the sword of the spirit, valiantly defending the righteous principles of Almighty God as commanded by the apostle Paul: "Put on the complete suit of armor from God that you may be able to stand firm against the machinations of the Devil, because we have a fight, not against blood and flesh, but against the governments, against the authorities, against the world-rulers of this darkness, against the wicked spirit forces in the heavenly places. On this account take up the complete suit of armor from God, that you may be able to resist in the wicked day and, after you have done all things thorough-

ly, to stand firm."—Ephesians 6: 10-13, *New World Translation.*

Since they are in Jehovah's army of gospel-preachers they certainly have conscientious objections to serving in the armies of the evil world of Satan. As soldiers of God they cannot engage in the conflicts and warfare that flow from the affairs of this world. They cannot be in two armies at the same time. Since they have been enlisted and serve in Jehovah's army as his ministers, they must be at their missionary posts of duty. They cannot leave such posts in order to take up service in some other army. To quit Jehovah's army and join the armies of Satan's world would make the soldiers of God deserters. Deserters are covenant-breakers. "Covenantbreakers . . . are worthy of death." (Romans 1: 31, 32) The nations of this world cannot excuse Jehovah's soldier from the penalty of death prescribed by Almighty God for deserters from his army. Caesar, not being able to relieve him from his covenant obligations or violations thereof, should not command him to become a renegade and deserter from Jehovah's army to join his. That would result in his everlasting death. "And do not become fearful of those who kill the body but cannot kill the soul, but rather be in fear of him that can destroy both soul and body in Gehenna. Do not be afraid of the things you are destined to suffer. Look! the Devil will keep on throwing some of you into prison that you may be fully put to the test, and that you may have tribulation ten days. Prove yourselves faithful even with the danger of death, and I will give you the crown of life."—Matthew 10: 28; Revelation 2: 10, *New World Translation.*

In the Hebrew Scriptures there are many cases where Jehovah's Witnesses fought and used violence and carnal weapons of warfare. They fought in the armies of the nation of Israel. At the time they fought as members of the armed forces of Israel it was God's chosen nation. They did not, however, enlist or volunteer in the armies of the foreign nations round about. They fought only in the armed forces

of Israel, the nation of God. They did not join the armies of the Devil's nations. They maintained strict neutrality as to the warring nations who were their neighbors. When Jehovah abandoned and destroyed his chosen nation, he abandoned completely and forever the requirement that his people fight with armed forces. Since then there has been no force used by his witnesses in any armed force.

There is no record in the Bible that any of the faithful Israelites enlisted in the armed forces of or fought in behalf of any of the Devil's countries or nations. To the contrary, we have the instance of Abraham who maintained his neutrality. (Genesis 14) Also to the same effect is Zerubbabel, a soldier of Jehovah, who had a covenant to rebuild the temple. He refused to participate in the military conflicts that the world power, Medo-Persia, got into. He remained strictly neutral. For so doing he was accused of sedition and was prosecuted. Jehovah, however, blessed him for his neutral stand and for keeping to his post of duty under his covenant obligations.—Ezra 5:1-17; 6:1-22.

This position of strict neutrality, requiring refusal to participate in international conflicts between the forces of the nations of Satan's world, is also based on the Bible ground that Jehovah's Witnesses are ambassadors who serve notice of the advance of the great warrior, Christ, who is leading a vast army of invisible warriors of the armed force of Jehovah. (2 Corinthians 5:20; Revelation 19:14) He is advancing against Satan's organization, all of which, human and demon, he will destroy at the battle of Armageddon.

Jehovah's Witnesses do not participate in the modern-day armed forces of Jehovah. (2 Chronicles 20:15-17) Participation in that armed force is limited to the powerful angelic host, led by the invisible Commander, Christ Jesus. He rides at the front on his great white war mount. (Revelation 19:11-14) The weapons of the invisible forces of Jehovah are unseen but destructive weapons. Such will make the weapons of Caesar's armed forces of this world like

children's toys in comparison. (Joel 3:9-15; Isaiah 40:15) Jehovah's weapons of destruction at Armageddon will be used only by his invisible forces, and not by Jehovah's Witnesses.

The weapons of warfare wielded by Jehovah's Witnesses are confined to instruments that cannot be used in violent warfare. They use the "sword of the spirit, which is the word of God," as his Christian soldiers and ambassadors to warn the nations of this world of the coming battle of Armageddon. That will result in the defeat of all of Satan's armies and the wiping off the face of the earth of all the nations and governments of this evil world. "For it is my decision to gather nations, to assemble kingdoms, that I may pour out my wrath upon them, all the heat of my anger, for in the fire of my zeal all the earth shall be consumed." (Zephaniah 3:8, *An American Translation;* Jeremiah 25:31-33; Nahum 1:9, 10) They therefore cannot give up the weapons of their warfare and take up the weapons of violence in behalf of the nations of the world of Satan. The use of such weapons by Jehovah's Witnesses and their participation in any way in the international armed conflicts would be in defiance of the unchangeable law of Almighty God.

There is no record that the Lord Jesus or his apostles or disciples entered the armies of Caesar. The record of secular history shows that the early Christians at Rome refused to fight in Caesar's army. They were thrown to the lions and persecuted because of following the command of Christ Jesus to disassociate themselves from the affairs of the evil world.

The basis of objections to military service by followers of Christ Jesus, including the early Christians at Rome and their modern-day counterparts, Jehovah's Witnesses, can best be summed up by Jesus, who declared, "My kingdom is no part of this world. If my kingdom were part of this world, my attendants would have fought that I should not be delivered up to the Jews. But, as it is, my kingdom is not from this source." (John 18:36, *New World Translation*)

Since Jehovah's Witnesses are not of this world, then, as the Lord Jesus did not, they cannot fight in or join up with the armed forces of the nations of this world represented by Caesar. They, accordingly, render unto God that which is God's by remaining steadfastly in his army of witnesses and refusing to volunteer or submit to the armed forces of Caesar in international conflicts. They render unto Caesar all obligations of citizenship that do not require them to violate God's law. Thus they do as Jesus said: "Pay back Caesar's things to Caesar, but God's things to God."—Mark 12:17, *New World Translation.*

Jehovah's Witnesses do not advocate that the governments of this world do not have the right to raise armies from those other than the ministers of God. They do not teach others of Jehovah's Witnesses or people who are not to refuse to support the armed forces or volunteer for service. It would be wrong to do so. They render unto Caesar the things that are Caesar's by not teaching the subjects of Caesar to refuse to fight. Jehovah's Witnesses do not aid, abet or encourage persons who are not ministers with conscientious objections to resist the commands of Caesar. They do not, in fact, tell each other what to do or not to do. Each witness of Jehovah decides by himself alone what course he will take. His decision as to whether to render to God what is God's is dictated by his individual understanding of the law of God in the Word of Jehovah, the Bible. His decision is formed not by the written or printed word of the Watchtower Society or any person among Jehovah's Witnesses.

The draft act provides for the deferment of conscientious objectors, as well as the exemption of ministers of religion. Jehovah's Witnesses are entitled to claim the exemption granted to the ministers of God and the orthodox clergy. They are also entitled to the deferment extended to the conscientious objectors who refuse to participate in warfare based on religious training and belief notwithstanding the fact that they are not pacifists. In complying with such

law by claiming such ministerial exemption and deferment they render to Caesar the things that belong to Caesar. They are therefore consistent in making their claim. They are conscientious objectors but not pacifists. In taking this stand they continue and remain God's ministers, properly called the witnesses of Jehovah.

Jehovah's Witnesses do not consider the act unconstitutional. They believe that it is within the province of a nation to arm itself and resist attack or invasion. It is admitted that the Government has the authority to take all reasonable, necessary and constitutional measures to gear the nation for war and so lubricate the war machinery to keep it working effectively.

Conscription of manpower for the purpose of waging war is of ancient origin. Before the Roman Empire and early world powers, the nation of Israel registered men for military training and service. Complete exemption from military service and training was provided, however, for ministers and priests known as "Levites." Twenty-three thousand of the first registration were completely exempt according to statistics. Under this system of raising and maintaining an army the Jewish nation fought many battles and gained many victories. Since the destruction of the Jewish nation, Jehovah's Witnesses have been neither commanded nor authorized to conscript man power or wage wars. They are not organized as a nation in the world as were the Israelites. They are in the world as ambassadors to represent God's kingdom, as witnesses to proclaim The Theocracy, the only hope of the people of good will to obtain peace, prosperity, happiness and life. They neither oppose nor advocate opposition to or participation by others in war. Each one, individually, determines for himself what course he must take according to the perfect Word of God. As one of the "royal priesthood," Jehovah's Witnesses, as the Levites, lay claim to complete exemption from military

service according to the provision of the act because they are ordained ministers of the gospel of God's kingdom. This position of strict neutrality is the position taken by everyone who fights not with carnal weapons and faithfully and strictly follows in the footsteps of Christ Jesus and preaches the gospel as did he and his apostles, according to the Holy Word of God.

History shows that the early Christians claimed exemption from military service required by the Roman Empire, because they were set apart from the world as a royal priesthood to preach God's kingdom. Hence they were neutral toward war. They claimed complete exemption from training and service, which was disallowed by the Roman Empire. Because they refused military service they were cruelly persecuted, sawn asunder, burned at the stake and thrown to the lions.—See Henry C. Sheldon, *History of the Christian Church,* 1894, Crowell & Co., New York, p. 179 *et seq.;* E. R. Appleton, *An Outline of Religion,* 1934, J. J. Little & Ives Co., New York, p. 356 *et seq.;* Capes, *Roman History,* 1888, Scribner's Sons, New York, p. 113 *et seq.;* Willis Mason West, *The Ancient World,* 1913, Allyn & Bacon, Boston, pp. 522-523, 528 *et seq.;* Capes, *The Roman Empire of the Second Century,* Scribner's Sons, New York, p. 135 *et seq.;* Ferrero & Barbagallo, *A Short History of Rome* (translated from Italian by George Chrystal), Putnam's Sons, New York, 1919, p. 380 *et seq.*

A realistic approach to the construction of an act providing for benefits to religious organizations requires that boards make "no distinction between one religion and another. . . . Neither does the court, in this respect, make any distinction between one sect and another." (Sir John Romilly in *Thornton* v. *Howe,* 31 Beavin 14) The theory of treating all religious organizations on the same basis before the law is well stated in *Watson* v. *Jones,* 80 U. S. (13 Wall.) 679, 728, thus: "The full and free right to entertain any religious belief, to practice any religious principle, and to

teach any religious doctrine which does not violate the laws of morality and property and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." It must be assumed that Congress, when it provided for ministers of religion to be exempt from all training and service, intended to adopt the generous policy above expressed so as to extend to all ministers of all religious organizations.

It has been judicially declared that were "the administration of the great variety of religious charities, with which our country so happily abounds, to depend upon the opinion of the judges, who from time to time succeed each other in the administration of justice, upon the question whether the doctrines intended to be upheld and inculcated by such charities, were consonant to the doctrines of the Bible; we should be entirely at sea, without helm or compass, in this land of unlimited religious toleration." (*Knistern* v. *Lutheran Churches,* 1 Sandf. Ch. (N. Y.) 439, 507) All religions, however orthodox or heterodox, Christian or pagan, Protestant or Catholic, stand equal before the law which regards "the pagan and the Mormon, the Brahmin and the Jew, the Swedenborgian and the Buddhist, the Catholic and the Quakers as all possessing equal rights." (*Donahoe* v. *Richards,* 38 Me. 379, 409. Cf. *People* v. *Board of Education,* 245 Ill. 334, 349; *Grimes* v. *Harmon,* 35 Ind. 198, 211) Protection is therefore afforded not only "to the different denominations of the Christian religion, but is due to every religious body, organization or society whose members are accustomed to come together for the purpose of worshiping the Supreme Being." (*Freeman* v. *Schere,* 65 Neb. 853, 879, 93 N. W. 169) It is now clear that the American legislative, executive and judicial policy concerning religious organizations, beliefs and practices is one of masterly inactivity, of hands off, of fair play and no favors. (*People* v. *Steele,* 2 Bar. 397) "So far as religion is concerned the laissez faire theory of government has been given the widest possible

scope."—*Freeman* v. *Scheve,* 65 Neb. 853, 878, 93 N. W. 169.

Neither Shakers nor Universalists will be discriminated against in distributing the avails of the land granted by Congress in 1778 for "religious purposes." (*State* v. *Trustees of Township,* 2 Ohio 108; *State* v. *Trustees,* Wright 506 (Ohio)) Whatever the personal views of a judge may be concerning the principles and ceremonies of the Shaker society, whether to his mind their practices smack of fanaticism or not, he has no right to act upon such individual opinion in administering justice. (*People* v. *Pillow,* 3 N. Y. Super. Ct. (1 Sandf.) 672, 678; *Lawrence* v. *Fletcher,* 49 Mass. 153; *Cass* v. *Wilhite,* 32 Ky. (2 Dana) 170) In the field of religious charities and uses the doctrine of superstitious uses was eliminated from American jurisprudence as opposed to the spirit of democratic institutions because it gave preference to certain religions and discriminated against others. It was held that the doctrine contrary to "the spirit of religious toleration which has always prevailed in this country" and could never gain a foothold here so long as the courts were forbidden to decide that any particular religion is the true religion. (*Harrison* v. *Brophy,* 59 Kans. 1, 5, 51 P. 885; cf. *Methodist Church* v. *Remington,* 1 Watts (Pa.) 219, 225, 26 Am. Dec. 61; *Andrew* v. *New York Bible and Prayer Book Society,* 6 N. Y. Super. Ct. (4 Sandf.) 156, 181) Thus in the field of various religions as long as a particular method of preaching does not conflict with the law of the rights of others no matter how exotic or curious it may be in the opinion of others it is fully protected by the law. —*Waite* v. *Merrill,* 4 Me. (4 Greenl.) 102, 16 Am. Dec. 238, 245.

Congress did not intend to confer upon the draft boards or the district judge arbitrary and capricious powers in the exercise of their discretion. They have discretion to follow the law when the facts are undisputed. If there is a dispute, the boards have the jurisdiction to weigh the testimony. In the case of a denial of the conscientious objector status, if there is no dispute in the evidence and the docu-

mentary evidence otherwise establishes that the registrant is a conscientious objector, it is the duty of the court to hold that there is no basis in fact. It must conclude that there is an abuse of discretion, and that the classification is arbitrary and capricious. It is submitted that such is the case here. The undisputed evidence shows that the appellant is a conscientious objector entitled to the 1-O classification. The denial of the classification is without basis in fact. The classification of I-A flies in the teeth of the evidence. Such classification is a dishonest one, making it unlawful.—*Johnson* v. *United States,* 126 F. 2d 242, at page 247 (8th Cir.).

There is a district court opinion that bears directly upon the question involved here. This is the unreported oral opinion rendered by Judge Clifford from the bench, sitting in the United States District Court for the District of New Hampshire in cause No. 6216, *United States* v. *Konides*, March 13, 1952. In that case one of Jehovah's Witnesses was denied the conscientious objector status. The facts, as far as the evidence appearing in the file on the subject of conscientious objection is concerned, were identical to the facts in this case. A printed copy of the stipulation of fact and oral opinion rendered by Judge Clifford is here referred to and accompanies this brief.—Compare *Phillips* v. *Downer,* 135 F. 2d 521, 525-526 (2d Cir.); *United States* v. *Grieme,* 128 F. 2d 811 (3rd Cir.).

A case closely in point here is *United States* v. *Graham,* 109 F. Supp. 377 (W. D. Ky., Dec. 19, 1952), where the defendant was a member of the National Guard at the time of his registration and the filing of his original questionnaire. The board had deferred him because of his membership in that military organization. Following this he became one of Jehovah's Witnesses. He later filed claims for classification as a minister of religion and as a conscientious objector. The case was appealed to the National Selective Service Appeal Board, which classified him in Class I-A. The classification was set aside as arbitrary and capricious. Read at page 378.

The pivotal decision for the determination of issues raised in draft prosecutions is *Estep* v. *United States,* 327 U. S. 114. The Supreme Court there itemized certain things committed by a draft board "that would be lawless and beyond its jurisdiction." (327 U. S., at page 121) Read what the Court said about provisions of the act that make determinations of draft boards "final," at pages 121-123.

In note 14 of the *Estep* opinion (at page 123) the Court says that the scope of judicial inquiry to be applied in draft cases is the same as that of deportation cases, and the Court cited *Chin Yow* v. *United States,* 208 U. S. 8; *Ng Fung Ho* v. *White,* 259 U. S. 276; *Mahler* v. *Eby,* 264 U. S. 32; *Vajtauer* v. *Commissioner,* 273 U. S. 103; *Bridges* v. *Wixon,* 326 U. S. 135. In this note the Court added that "is also the scope of judicial inquiry when a registrant after induction seeks release from the military by *habeas corpus.*" The Court concluded note 14 explaining the scope of judicial review by citing the opinion of the Second Circuit in *United States* v. *Cain,* 144 F. 2d 944 (2d Cir.).—327 U. S., at page 123.

In the *Estep* case, the Court said that, in reviewing draft board files, judges are not to weigh the evidence to determine whether the classification was justified. A court weighs the evidence only when there is some contradiction in the evidence. There must be some dispute before this burden falls upon the court to determine whether the classification is justified. The Court added, however, that if there is no basis in fact for a classification after a review of the file by a court, it would be the duty of the court to hold that the classification was beyond its jurisdiction.—327 U. S., at page 122.

There is no basis in fact for the classification in this case because there are no facts that contradict the documentary proof submitted by the appellant. The facts established in his case show that he is a conscientious objec-

tor to noncombatant service and, therefore, the classification given is beyond the jurisdiction of the boards.

The undisputed evidence shows that appellant is sincere in his objections. He is opposed to any form of participation in war by himself. This objection comes from an immovable belief in the Supreme Being. It is not based on sociological, political or philosophical beliefs. It is supported by the direct Word of God, the Bible. It is not a limited objection that he has. He is not willing to join the army as a noncombatant soldier or go in as a conscientious objector only to actual combat service. He objects to doing anything in the armed forces. He will not be a soldier.

It was well known to the Congress, the nation, the Government and the courts of the United States that Jehovah's Witnesses are conscientiously opposed to noncombatant military service. They were not unaware that these objections of Jehovah's Witnesses are based on a belief in the supremacy of God's law above obligations arising from any human relationship. These facts bring Jehovah's Witnesses within the plain words of the act. Twisting the words of the law and discoloring the act subvert the intent of Congress not to discriminate.

The strict construction of the act advocated by the Government and the court below was not intended by Congress; Congress had in mind a liberal interpretation of its provision for conscientious objectors to protect the religious objector. The records of the hearings in Congress, the reports and the act all prove a broad exemption was intended. Congress had in mind that objection to war is a part of the religious history of this country. Conscientious objection was recognized by Massachusetts in 1661, by Rhode Island in 1673 and by Pennsylvania in 1757. It became part of the laws of the colonies and states throughout American history. It finally became part of the national fabric during the Civil War and has grown in breadth and meaning ever

since. (See Selective Service System, *Conscientious Objection,* Special Monograph No. 11, Vol. I, pp. 29-66, Washington, Government Printing Office, 1950.) So strongly was the principle of conscientious objection imbedded in American principles that President Lincoln and his Secretary of War thought that conscientious objectors had to be recognized. This is impressed upon us by Special Monograph No. 11, Vol. I, *supra,* at page 43: "At the end of hostilities Secretary of War Stanton said that President Lincoln and he had 'felt that unless we recognize conscientious religious scruples, we could not expect the blessing of Heaven.'"

As appears above, the Selective Service System in Special Monograph No. 11, Vol. I, carries the history far back, even before the American Revolution. (*Ibid.,* pages 29-35) Virginia and Maryland exempted the Quakers from service. (*Ibid.,* page 37) From the Revolution to the Civil War provision for exemption of conscientious objectors appears in the state constitutions. During the Civil War the military provost marshal was authorized to grant special benefits to noncombatants under Section 17 of the act, approved February 24, 1864. Lincoln was urged to force conscientious objectors into the army. He replied:

> "No, I will not do that. These people do not believe in war. People who do not believe in war make poor soldiers. . . . These people are largely a rural people, sturdy and honest. They are excellent farmers. The country needs good farmers fully as much as it needs good soldiers. We will leave them on their farms where they are at home and where they will make their contributions better than they would with a gun."—*Ibid.,* pages 42-43.

Congress certainly must have had in mind the historic national policy of fair treatment to conscientious objectors. The well-known governmental sympathy toward the Quak-

ers and others was not ignored by Congress when the act was passed. Congress must have had in mind the historic considerations enumerated by the Supreme Court in *Girouard* v. *United States,* 328 U. S. 61. Read 328 U. S., at pp. 68-69.

In passing the provisions for conscientious objection to war in all the draft laws Congress had this long history in mind. It intended to preserve the freedom of religion and conscience in regard to conscientious objection, and it provided a law whereby such freedom could be preserved.

In his recommendation the Assistant Attorney General said that because Batelaan is willing to defend himself, his family and others of Jehovah's Witnesses he is not a conscientious objector. This is an artificial and unauthorized ground for the denial of the conscientious objector status invented by both the local board upon the personal appearance and by the hearing officer in his first report. They attempted to amend the act and regulations and read into them things which are not there. The law cannot thus be watered down by writing into it provisions that do not appear in it. This type of amendment of the law is contrary to the concept of government. Neither the administrators nor the court can add to or take away from the words of Congress expressed in the act. Even the President in the promulgation of the regulations did not incorporate these specious arguments and grounds into the definition of a conscientious objector. If the draft boards, the hearing officers and others are to write the qualifications of a conscientious objector according to their whims and discretion, then the rights of the registrant will be made valueless and insecure. The law will be done away with.

Again it must be iterated that it is not necessary for a conscientious objector to be a sissy or willing to commit suicide in order to come under the definition of a conscientious objector. A man can even be classified as a conscientious objector in Class I-A-O and allowed to perform military service without bearing a gun, providing he

is willing to do hospital work or similar noncombatant service. Remember such a man is still a conscientious objector! The argument of the United States Attorney and the draft board, if followed to its logical conclusion, would authorize the forfeiture of the I-A-O classification to a conscientious objector. Congress did not intend this. If a man can be a conscientious objector and work in a hospital in an army, then why the difference here? Certainly a man can defend himself and at the same time claim conscientious objection to both combatant and noncombatant military service.

The only conceivable basis for the denial of the full conscientious objector status is that the defendant stated that he was willing to defend himself. Certainly the exercise of the right of self-defense does not carry with it the agreement that the person willing to defend himself has no conscientious objections to going into the armed forces.

Congress did not intend to forfeit the conscientious objector status to those that are willing to defend themselves. This is proved by the provision for the I-A-O classification. This classification is for the conscientious objector who is willing to do noncombatant service in the armed forces. If willingness to do this type of service does not forfeit the conscientious objector status, then by force of the same reason willingness of the conscientious objector to defend himself with his own hands when attacked does not impeach his good faith. The pivotal factor in determining the conscientious objector status is whether the registrant objects to military service on account of religious training and belief and not whether he objects to self-defense. If the facts show that he has conscientious objections to both combatant and noncombatant military service then he is entitled to the conscientious objector status regardless of his lack of objections to self-defense. Willingness to defend oneself is immaterial and irrelevant to the issues involved in the case.

If Congress intended to forfeit a man's rights as a conscientious objector because he would defend himself in

case of assault upon his person, then certainly Congress would have made this an element of the conscientious objector status. Congress explicitly stated that objections to military service could not be based on political and philosophical bases. Congress could very well have stated that a man could not be a conscientious objector if he was willing to fight in self-defense. From the dawn of history of mankind it has been the prerogative of an individual to defend himself. Self-defense has been said to be the first law of nature. It is the law of God. Self-defense is inherent in the nature of man. Congress knew this characteristic of man when it passed the law. Had Congress intended to eliminate a person who was willing to defend his own life from the status of conscientious objector, it would have plainly said so.

The law grants the conscientious objector status to one who has objections to participation in both combatant and noncombatant military service in the armed forces because his belief arises out of obligations to the Supreme Being that are superior to those owed to the state. Congress did not say that the status was granted only to people who were extreme pacifists. Taking Congress at its own words, it cannot be contended by anyone, whether he be a draft board member, judge or prosecutor, that it is necessary to willingly submit to destruction of one's own life in order to be a conscientious objector to military service. Such interpretation contended for is unreasonable. It pulls the teeth out of the provisions protecting conscientious objectors. Unless and until Congress explicitly states that one who is willing to defend himself is not a conscientious objector, then it is beyond the prerogative of the Government or the courts to read into the law something that Congress did not say.

A man can be a conscientious objector under the act and still be willing to fight in defense of his life, his loved ones and his home. A man can be a very sincere conscientions objector to service in the armed forces, combatant

or noncombatant, and still be willing to fight to defend his own life. It is virtually impossible for a man to be a conscientious objector if the law is given the interpretation that has been contended for in this case. Almost every person, even if a coward, a sissy or extreme pacifist, when put to the test will, as a last resort, fight to defend himself. Since it is the 'first law of nature,' which almost every man will exercise when placed in the position where it is necessary, it is unreasonable to suggest that Congress intended to defeat, by this sophisticated type of reasoning, the very purpose of the exemption.

Congress had in mind exempting people who had conscientious objections to service in the armed forces. Congress did not say that the exemption extended only to people who had objections to participation in service in the armed forces and also objections to the use of force in self-defense. Since the willingness to fight in self-defense was not incorporated into the act and regulations as a basis for the denial of the conscientious objector status, it is absolutely unreasonable to hold that a man cannot be a conscientious objector unless he also objects to the use of force under every circumstance, including self-defense.

A Christian who is one of Jehovah's Witnesses, as is defendant, is authorized by the law of God to defend his own life. In order to protect himself and his life he may use force to such extent as appears reasonably necessary. If required to repel and quell a bodily attack upon himself and his brothers, he may use force to the extent of killing. This is authorized by the law of the land. A Christian need not always retreat before defending against an aggressor. Sometimes retreat under the circumstances would be more dangerous than to stand one's ground and fight. This was

the position taken by defendant and explained to his local board and the hearing officer.

The argument that follows is based upon the answers given by the defendant in his draft file. This documentary evidence appearing in the draft board file supports in every respect the argument that follows.

It is entirely consistent for a minister to be a conscientious objector to military service and yet not be a pacifist. Pacifism means refusal to fight or kill under any circumstances. A Christian will fight and even kill under some circumstances, which are limited. Jehovah's Witnesses are not pacifist, because they will fight when God authorizes them to fight. They will fight in defense of their ministry and their brothers. (Matthew 12:49, 50) They have precedent for fighting for Jehovah's work and their brothers. Abraham fought in order to protect and rescue Lot. (Genesis 14) Nehemiah and his brothers fought to defend Jehovah's work in rebuilding the walls of Jerusalem. —Nehemiah 4.

The courts have uniformly held that willingness to exercise self-defense or defend others from violence is not basis for denial of the conscientious objector status.—*Annett* v. *United States,* 205 F. 2d 689 (10th Cir., June 26, 1953); *United States* v. *Pekarski,* — F. 2d — (2d Cir. October 23, 1953); *Taffs* v. *United States,* — F. 2d — (8th Cir., December 7, 1953).

It is, therefore, respectfully submitted that the motion for judgment of acquittal should have been sustained, because the board of appeal arbitrarily and capriciously classified Batelaan in I-A and denied him his claim for classification as a conscientious objector without basis in fact.

POINT TWO

The court below committed reversible error when it refused to receive into evidence the FBI report and excluded it from inspection and use by the court and the appellant upon the trial of this case.

Upon the trial appellant subpoenaed the secret investigative report of the FBI. A motion to quash was made by the Government. This was denied. At the trial the court permitted the report to be marked for identification and received as a sealed exhibit after the trial court made an inspection of the exhibit. The trial court found the secret FBI report to be material but refused to permit it to be used as evidence.

The secret report of the FBI made in the investigation of the conscientious objector claim of appellant was subpoenaed. Upon the trial it was offered in evidence by the appellant. The trial court excluded the document and forbade it to be received into evidence. It ordered it sealed and marked for identification so that the bill of exception on the ruling denying admission of the document into evidence could be preserved for this Court. The appellant moved to inspect the document and requested the court to receive it as evidence on several occasions. This request was denied every time that it was made. The trial court found the document to be material, but refused to allow it to go into evidence because it held the order of the Attorney General, No. 3229, made the report confidential and forbade that it be received into evidence.

Under the decision of the Supreme Court of the United States in *United States* v. *Nugent,* 346 U. S. 1, it was held that the statute required the Department of Justice to make a fair, complete résumé or summary of all the FBI investigative report and give it to appellant. A résumé or summary was given to appellant on the hearing. A résumé or summary was made by the hearing officer to the Department of Justice.

The trial court, as a result of *Nugent* v. *United States,*

The only way that the Court can determine whether the summary that was given is adequate is to admit in evidence the FBI report. The only way the trial court could have discharged its responsibility in this case was to have the report produced. The trial court must say whether the summary of the secret FBI report made by the Department of Justice under Section 6(j) of the act is fair and adequate.

It is necessary, therefore, that the FBI report be produced to the Court. Unless and until this Court sees and examines the FBI report and also unless and until appellant sees and examines the FBI report and compares it with the summary that should have been made or compares it with the summary made by the Department of Justice to the appeal board, there is no due process.

The Court cannot discharge its judicial function and determine whether the summary required by the Supreme Court of the United States in *United States* v. *Nugent,* 346 U. S. 1, is fair and adequate unless and until the Court has actually seen and examined the secret FBI report. In fact appellant's rights are not preserved unless and until he has had an opportunity to examine the secret FBI report and compare it with the summary required to be made.

The decision of the Supreme Court in *United States* v. *Nugent,* 346 U. S. 1, dealt only with the contention that the secret FBI report should be produced to the registrant at the hearing in the administrative agency.

The trial court, as a result of *United States* v. *Nugent,* 346 U. S. 1, must determine another and different question. It is whether the *Nugent* opinion required the trial court to determine whether a summary of the adverse evidence was needed to be given and, if given, was it adequate? The holding in the *Nugent* case required the court to do that in this case. The court cannot discharge the judicial function placed upon it in the *Nugent* case without seeing the FBI report. The report cannot be seen without admitting it into evidence.

Even though the records sought by the appellant are claimed to be confidential by the Attorney General's Order

No. 3229 issued pursuant to 5 U. S. C. Section 22, they must be produced because such documents are a part of and form the basis of the administrative determination and action supporting the indictment questioned by the registrant.

The only time the privilege of the Department of Justice pursuant to Attorney General's Order No. 3229 (5 U. S. C. § 22) has been permitted to override the claim of procedural due process has been in cases where there is a plain showing that the disclosure would endanger the national security.

The Supreme Court refused to compel the revealing of evidence that would endanger national security in the case of *United States* ex rel. *Knauff* v. *Shaughnessy,* 338 U. S. 537. But even in such a case two justices thought that the evidence ought to be revealed. Mr. Justice Frankfurter said in his dissent at page 549:

> "... Congress ought not to be made to appear to require that they incur the greater hazards of an informer's tale without any opportunity for its refutation, especially since considerations of national security, insofar as they are pertinent, can be amply protected by a hearing *in camera* ..."

Mr. Justice Jackson in his dissent wrote:

> "Security is like liberty in that many are the crimes committed in its name. The menace to the security of this country, be it great as it may, from this girl's admission is as nothing compared to the menace of free institutions inherent in procedures of this pattern. In the name of security the police state justifies its arbitrary operations on evidence that is secret, because security might be prejudiced if it were brought to light in hearings. The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and

> the corrupt to play the role of informer undetected and uncorrected. Cf. In re *Oliver,* 333 U. S. 257, 268. . . . Likewise, it will have to be much more explicit before I can agree that it authorized a finding of serious misconduct against the wife of an American citizen without notice of charges, evidence of guilt and a chance to meet it."—338 U. S., at pages 551-552.

There is surely no need under the guise of national security to conceal from the courts the contents of an FBI report of a conscientious objector. It is not one that may affect national security. After all, the FBI report of the conscientious objector merely deals with a man's daily conduct, his religious practices and his habits. If a question of security or national interest should ever come up in the report of the FBI concerning a conscientious objector, the Attorney General could show it. Then there would be no difficulty in keeping such matters secret. To deprive a man of valuable evidence that may affect his liberty on the ground of mere administrative privilege without some good ground for it is repugnant to free institutions. This was stressed in the concurring opinion of Mr. Justice Frankfurter in the case of *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, at page 172. That was the opinion of Mr. Justice Frankfurter under an order of the Attorney General that required appropriate investigation and determination.

Unless the Government can show some legally recognizable ground for refusing to produce the FBI report at the trial in the district court, then the FBI report must be produced at such trial for inspection and use by the defendant. The reasons why the report of the FBI must be produced have been set forth by the registrant. In opposition to these points the Government argues that Order No. 3229 of the Attorney General is sufficient to overcome the requirements of the Constitution, and "fair play." However,

Order No. 3229 was issued pursuant to 5 U. S. C. Sec. 22. That statute provides that the order shall not be in contravention of law. It has been shown that the due-process clause of the Fifth Amendment requires production of all material documents at trial. The Constitution requires due process. The due process requires a hearing and an opportunity to be heard. Order 3229, as here applied, is, therefore, in contravention of law.

While the Supreme Court has held that Order No. 3229 is valid, it has left open for the courts to decide the extent to which the Attorney General may use that order to deprive a party of the right to see and use documents. That was decided in *United States* ex rel. *Touhy* v. *Ragen,* 340 U. S. 462, at 469:

> ". . . But under this record we are concerned only with the validity of Order No. 3229. The constitutionality of the Attorney General's exercise of a determinative power as to whether or on what conditions or subject to what disadvantages to the Government he may refuse to produce government papers under his charge must await a factual situation that requires a ruling. This case is governed by *Boske* v. *Comingore,* 177 U. S. 459."

In a concurring opinion, Mr. Justice Frankfurter said at page 472:

> "There is not a hint in the *Boske* opinion that the Government can shut off an appropriate judicial demand for such papers."

The Government gives no specific reason why the report is so confidential that it should not be produced, such as saying that the report has information the disclosure of which might affect internal security or might affect the interests of the Government in some specific way. A general privilege or departmental order, without a specific reason given, should not be permitted to deprive a party of valu-

able evidence to which he is entitled by law. This was expressed in the case of *Bank Line* v. *United States,* 163 F. 2d 133 (2d Cir.), by Judge Clark in a concurring opinion at page 139:

> "... but I think no general statement of prejudice to its best interests can or should be applied to any branch of the government, including the armed forces ..."

United States ex rel. *Touhy* v. *Ragen,* 340 U. S. 462, is not in point. There the proceeding did not involve the Government as a party or a criminal proceeding. (See note 6 of that opinion.) The specific provisions of the Rules of Criminal Procedure authorizing production of documents were not there involved. The decision involved the validity of Order No. 3229 on its face. (See notes 1 and 2 of the opinion for the order and Supplement No. 2.) It is the validity of the order, as construed and applied to the particular facts, that the Court is here concerned with.

The principle that distinguishes the *Touhy* case from this case is well expressed in *Kentucky-Tennessee Light and Power Company* v. *Nashville Coal Company,* 55 F. Supp. 65 (W. D. Ky.) as follows:

> "I do not believe that the rule or the statute is applicable to the present case. In both of the cases referred to the federal employee involved was called as a witness and declined to testify. That is essentially different from being a party to the suit where there is a contest between the plaintiff and the defendant involving property which the defendant has taken into his possession."

It has been repeatedly held that Order No. 3229 and 5 U. S. C. § 22 do not establish an inexorable privilege and command prohibiting disclosure of the FBI report in judicial proceedings. When it has become material in proceedings brought by the Government, it has been repeatedly held

that the privilege was waived and the Government could not successfully refuse to produce the report when demanded. It seems that when it became material in these administrative proceedings to determine the validity of the registrant's claim for classification as a conscientious objector, for the same reasons the FBI report must be produced. The citizen has the same rights to know the evidence against him before the administrative tribunal as when before the judicial tribunal. The administrative agency stands on no higher level before the Constitution than does the court.

> "A prosecutor must, to be fair, not only use the evidence against the criminal, but must not willingly ignore that which is in an accused's favor. It is repugnant to the concept of due process that a prosecutor introduce everything in his favor and ignore anything which may excuse the accused for the crime with which he is charged. It is manifest in this matter that some one identified with the prosecution, as the circumstances indicate very clearly, ignored a very material piece of evidence which, if it had been brought to the attention of the jury or the trial judge, would certainly have resulted in the acquittal of this relator . . . another Judge has said—'Though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained is unjust and dangerous to the whole community.' *Hurd* v. *People,* 25 Mich. 405."—*United States* ex rel. *Montgomery* v. *Ragen,* 86 F. Supp. 382, 387.

The argument of the Government and the cases relied upon by it that the withholding of the FBI statement is proper and required by Order No. 3229 and 5 U. S. C. § 22 have been distinguished in *United States* v. *Andolschek,* 142 F. 2d 503 (2d Cir.). There the court said:

> "However, none of these cases involved the

> prosecution of a crime consisting of the very matters nearly enough akin to make relevant the matters recorded. That appears to us to be a critical distinction. While we must accept it as lawful for a department of the government to suppress documents, even when they will determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the document may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave transactions in the obscurity from which a trial will draw them, or it must expose them fully."

The competence of the document has been established by sources outside the document itself. Under the act and regulations the FBI report is relied on by the officials of the Selective Service System in making their final classification. This situation makes inapplicable the principle relied on by the Government. (*United States* v. *Krulewitch,* 145 F. 2d 87 (2d Cir.)) In that case the court said:

> "But neither of these situations is like that at bar, where the competence of the document appeared without inspection, and inspection was necessary only to fulfill a procedural condition to its admission. In that situation inspection loses its character as a prying into the preparation of the prosecution and becomes merely a means of releasing evidence pregnant with importance in ascertaining the truth."

United States v. *Beekman,* 155 F. 2d 580 (2d Cir.), in-

volved a prosecution for violations of the OPA regulations. The trial court quashed the subpoena on a motion by the Government. On appeal the court reversed on account of the error. The court said:

> "We have recently held that when the government institutes criminal proceedings in which evidence, otherwise privileged under a statute or regulation, becomes importantly relevant, it abandons the privilege."

In *United States* v. *Cotton Valley Operators Committee,* 9 F. R. D. 719 (W. D. La. 1949), the defendants were charged with a violation of the Sherman Act. The defendants moved for discovery under the Rules of Civil Procedure. The Attorney General was ordered to produce all FBI reports and other records relating to the activity of the defendants so that the trial court could determine whether they were privileged as claimed by the Attorney General. On refusal to produce, the trial court dismissed the Government's action. It appealed to the Supreme Court. The dismissal was affirmed by an equally divided court.—339 U. S. 940 (1950).

Department of Justice Order No. 3229, relied on by the Government in support of its position that it may not be required to produce the documents requested, gets its life from Section 22 of Title 5 of the United States Code. This section provides that the regulations must be "not inconsistent with law."

The regulation, as construed and applied by the Attorney General in this case, is invalid and "inconsistent with law" expressed in Section 1670.17 of the Selective Service Regulations (32 C. F. R. § 1670.17) and in the Federal Rules of Criminal Procedure, Rule 17(c), as interpreted in *Bowman Dairy Co.* v. *United States,* 341 U. S. 214. The rule is law and has the effect of an act of Congress. (*Beasley* v. *United States,* 81 F. Supp. 518, 527 (E. D. S. C. 1948)) A departmental regulation against disclosure must yield to an Admiralty Rule. (*O'Neill* v. *United States,* 79 F. Supp.

827, 830 (E. D. Pa. 1948)) Order No. 3229 must also yield to Section 13(b) of the Universal Military Training and Service Act and Section 3(c) of the Administrative Procedure Act.

In *United States* v. *Schine Chain Theatres,* 4 F. R. D. 108 (W. D. N. Y. 1944), it was held that the nondisclosure regulation of the Department of Justice "does not prevent the court from ordering the production of files of the Department of Justice in all cases. There may be certain of such files which are entirely privileged and others which are not."

In *Bank Line* v. *United States,* 163 F. 2d 133 (2d Cir.), Judge Augustus Hand said:

> "It has been the policy of the American as well as of the English courts to treat the government when appearing as a litigant like any private individual. Any other practice would strike at the personal responsibility of governmental agencies, which is at the base of our institutions. The existence of government privileges must be established by the party invoking them and the right of government officers to prevent disclosure of state secrets must be asserted in the same way procedurally as that of a private individual."—163 F. 2d 133, at 138.

This statement by Judge Hand is in line with what was stated by Mr. Justice Frankfurter concurring in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123. He said:

> "Nothing has been presented to the Court to indicate that it will be impractical or prejudicial to a concrete public interest to disclose to organizations the nature of the case against them and to permit them to meet it if they can."—341 U. S., at p. 172.

The determination of whether the information sought is privileged is not to be made by the Attorney General. That question is to be determined by the court and not the Department of Justice. In *Zimmerman* v. *Poindexter,* 74 F. Supp. 933, 935 (Hawaii 1947), the court said the "clear mandate that all executive regulations be 'not inconsistent with law' circumscribes the power of the entity prescribing the regulation under consideration, and operates to make the applicability and enforceability of a specific department regulation a judicial question for ultimate decision by the court."

This point is further supported by the holding in *Griffin* v. *United States,* 183 F. 2d 990 (D. C. Cir.), where the court said:

> "However, the case emphasizes the necessity of the disclosure by the prosecution of evidence that may reasonably be considered admissible and usable to the defense. When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful. 'The United States Attorney is the representative not of an ordinary party to the controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interests, therefore, in a criminal prosecution is not it shall win a case, but that justice shall be done. *Burger* v. *United States,* 205 U. S. 78, 88.' "—183 F. 2d, at p. 993.

Attorney General Clark recognized that the question of privilege is one for the court to decide rather than for the Attorney General when he, in his Supplement Number 2, June 6, 1947, which clarified Order No. 3229, among other things, wrote:

> "If questioned the officer or employee should state

> that the material is at hand and can be submitted to the court for determination as to its materiality in the case and whether in the best public interests the information should be disclosed."

Recently, however, the Attorney General has instructed all United States Attorneys and all members of the Federal Bureau of Investigation to refuse to produce the FBI statement, even when requested and ordered by the courts. See Order No. 3229 (Revised), dated January 13, 1953, revoking Order No. 3229 (dated May 2, 1939) and Supplements 1, 2, 3 and 4 thereto, dated December 8, 1942, June 6, 1947, May 1, 1952, and August 20, 1952, which allowed the FBI report to be submitted to the court for a determination of whether it should or should not be produced.

This new policy established by Attorney General McGranery is contrary to the established rule of law announced many years ago by the Supreme Court. In considering the claim of privilege against producing documents containing trade secrets it has been held that it is a judicial decision for the court to make. Mr. Justice Holmes in *E. I. duPont de Nemours Powder Co.* v. *Masland,* 244 U. S. 100, said:

> " . . . and if . . . in the opinion of the trial judge, it is or should become necessary to reveal the secrets to others, it will rest in the judge's discretion to determine whether, to whom, and under what precautions the revelation should be made."—244 U. S., at 103.

The same rule ought to apply in the determination of the privilege urged by the Government.

It is submitted that the FBI report was not privileged and that the constitutional rights of the registrant were violated when it was not produced and not allowed to be used in evidence at the trial by the appellant.

CONCLUSION

WHEREFORE appellant prays that the judgment of the court below be reversed and the cause be remanded with directions to grant the motion for judgment of acquittal. The appellant, in the alternative, requests the Court to remand the case for new trial because of the error of the trial court in excluding relevant and material evidence, the secret FBI investigative report.

Respectfully,

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Counsel for Appellant

December, 1953.

No. 13,939

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM JOY BATELAAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM JOY BATELAAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

I.

STATEMENT OF JURISDICTION.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California on November 19, 1952, under Section 462 of Title 50, App., United States Code.[1] [Tr. pp. 3-4.]

On December 8, 1952, the appellant was arraigned, entered a plea of not guilty, and the case was set for trial on March 26, 1953.

On March 26, 1953, appellant was tried in the United States District Court for the Southern District of California before the Honorable William C. Mathes sitting

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[1]"Tr." refers to Transcript of Record.

without a jury, and was found guilty as charged in the indictment.

On April 7, 1953, appellant was sentenced to imprisonment for a period of four years and judgment was so entered. Appellant appeals from this judgment.

The District Court had jurisdiction of this cause of action under Section 462 of Title 50, App., United States Code, and Section 3231, Title 18, United States Code.

This Court has jurisdiction of the appeal under Section 1291 of Title 28, United States Code.

II.

STATUTES INVOLVED.

The Indictment in this case was brought under Section 462 of Title 50, App., United States Code.

The Indictment charges a violation of Section 462 of Title 50, App., United States Code, which provides, in pertinent part:

> "(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said section] . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . ."

III.

STATEMENT OF THE CASE.

The Indictment charges as follows:

"Indictment

[U. S. C., Title 50, App., Section 462—Universal Military Training and Service Act]

The grand jury charges:

Defendant William Joy Batelaan, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 83, said board being then and there duly created and acting, under the Selective Service System established by said act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class I-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on October 13, 1952, in Los Angeles County, California, in the division and district aforesaid; and at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do."

On December 8, 1952, appellant appeared for arraignment and plea, represented by J. B. Tietz, Esq., before the Honorable Ernest A. Tolin, United States District

Judge, and entered a plea of not guilty to the offense charged in the indictment.

On March 26, 1953, the case was called for trial before the Honorable William C. Mathes, United States District Judge, sitting without a jury, and the appellant was found guilty as charged in the indictment.

On April 7, 1953, appellant was sentenced to imprisonment for a period of four years in a penitentiary.

Appellant assigns as error the judgment of conviction on the following grounds:

A—The District Court erred in failing to grant the Motion for Judgment of Acquittal made at the close of the evidence. (Spec. of Error I—App. Br. p. 10.)[2]

B.—The District Court erred in convicting the appellant and in entering a judgment of guilt against him. (Spec. of Error II—App. Br. p. 10.)

C—The District Court committed reversible error in refusing appellant the right to use the secret investigative report at the trial as evidence to determine whether or not the report of the Hearing Officer and the recommendations of the Attorney General to the Board of Appeal was illegal, arbitrary, capricious and contrary to the facts appearing in the F.B.I. Report that appellant was a conscientious objector. (Spec. of Error III—App. Br. p. 10.)

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[2]"Spec. of Error" refers to "Specification of Error"; "App. Br." refers to "Appellant's Brief."

IV.

STATEMENT OF THE FACTS.

On July 11, 1950, William Joy Batelaan registered with Local Board No. 83, Burbank, California. He was eighteen years of age at the time, having been born on April 15, 1932.

On April 30, 1951, William Joy Batelaan filed with Local Board No. 83, SSS Form 100, Classification Questionnaire, and by signing Series XIV of this questionnaire informed the Local Board of his claim for exemption by reason of conscientious objection to participation in war in any form.

SSS Form 150, Special Form for Conscientious Objector, was furnished Batelaan and he completed this form and filed it with Local Board No. 83. Batelaan claimed to be a conscientious objector because of religious training and belief. He was classified 1-A on September 4, 1951, and was mailed SSS Form 110, Notice of Classification.

On September 12, 1951, Batelaan appealed the classification of 1-A given him by the Local Board.

On September 14, 1951, Batelaan requested a personal appearance before the Local Board. A personal appearance was granted for September 18, 1951.

On September 18, 1951, Batelaan appeared before the Local Board. Batelaan was continued in Class 1-A and he was so notified by the mailing of an SSS Form 100, Notice of Classification, to him.

On October 24, 1951, the Appeal Board reviewed Batelaan's Selective Service file and determined that he was not entitled to classification in either a class lower than 4-E or in Class 4-E and forwarded the file to the Department of Justice. A hearing was held by the Department of Justice Hearing Officer on July 1, 1952. The Hearing Officer recommended that Batelaan should not be given a classification of 4-E but should be given a classification of 1-A-O.

On July 24, 1942, the Assistant Attorney General, in his recommendation to the Appeal Board, denied all conscientious objector claims of Batelaan.

On July 29, 1952, the Appeal Board classified Batelaan 1-A. Batelaan was advised of this action by the Local Board on August 7, 1952.

On October 1, 1952, SSS Form 252, Notice to Report for Induction, was mailed to Batelaan, ordering him to report for induction into the armed forces of the United States on October 13, 1952, at Los Angeles, California.

On October 13, 1952, Batelaan reported for induction, as ordered, but refused to submit to induction into the armed forces of the United States.

V.

ARGUMENT.

A. Replying to Appellant's Assignment of Error, the Government Contends That the Classification Given the Appellant of 1-A Was Not Arbitrary and Capricious and Was Supported by Evidence Establishing a Basis in Fact.

There is no constitutional right to exemption from military service because of conscientious objection or religious calling. In *Richter v. United States,* 181 F. 2d 591 (9th Cir.), this Court says.

> "Congress can call everyone to the colors, and immunity from military services arises solely through Congressional grace in pursuance of traditional American policy of deference to conscientious objection, and there is no constitutional right to exemption because of conscientious objection or religious calling or conviction or activities."

Accord,

Tyrrell v. United States, 200 F. 2d 8 (9th Cir.).

Congress has granted exemptions and deferments from military service only to those who qualify under the procedure set up by Congress to determine classification—the Selective Service System. This procedure is administrative in nature, even though one may be criminally prosecuted for failure to comply with the orders of the Selective Service System.

Falbo v. United States, 320 U. S. 549;

Williams v. United States, 203 F. 2d 85.

The duty to classify and to grant or deny exemptions rests upon the draft boards, local and appellate. The burden is upon a registrant claiming an exemption or deferment to establish his eligibility therefor to the satisfaction of the local or appellate board.

United States v. Schoebel, 201 F. 2d 31 (7th Cir.);
Davis v. United States, 203 F. 2d 853 (8th Cir.).

Each registrant is presumed to be available for military service.

32 C. F. R., Sec. 1622.1(c);
United States v. Schoebel, supra.

Every registrant who fails to establish, to the satisfaction of a local or appellate board, his eligibility for exemption or deferment is placed in Class 1-A.

32 C. F. R., Sec. 1622.10.

In the instant case, both the local and appellate boards considered the claims for exemption made by the appellant. Both boards rejected the appellant's claim based upon the information presented to them.

The classification by the Local Board and thereafter by the Appeal Board, made in conformity with the regulations, was final. The United States Supreme Court in *Estep v. United States,* 327 U. S. 114, at pages 122-133, in considering this point, says:

> ". . . The provision making the decision of the local boards 'final' means to us that Congress was not to give administrative action under this Act the customary scope of judiciary review which ob-

tains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."

The Selective Service file of the appellant in the present case indicates sufficient basis in fact for the denial by the local and appellate boards of his claims as a minister and conscientious objector.

Appellant was employed 40 hours per week in an occupation devoted almost entirely to the production of materials for the carrrying on of a war. It cannot be said that either a local or an appellate board considering these facts was arbitrary or capricious in denying a claim of exemption as a minister of religion or conscientious objector to participation in war in *any* form.

There was, therefore, no error in the ruling of the trial court in refusing to grant appellant's Motion for Judgment of Acquittal.

B. Appellant Raises No Points Not Already Considered Under the Government's Argument in "A" Above.

It is therefore, respectfully requested that the Government's argument in answer to Specification of Error I be made applicable also to Specification of Error II.

C. There Was No Reversible Error in the Refusal of the Trial Court to Admit as Evidence the Investigative Report Made by the Federal Bureau of Investigation, Upon the Sincerity of Appellant's Conscientious Objector Claim.

It is established that exemption by reason of religious training and belief is not a constitutional right, *United States v. MacIntosh,* 283 U. S. 605; *Girouard v. United States,* 328 U. S. 61. However, Congress has provided for exemption by reason of religious training and belief. In making such a provision, Congress established a certain procedure to be followed in the procuring of these exemptions. Establishment of such a procedure has created certain "rights" which must be afforded all persons who can establish eligibility under its provisions. A variance from this procedure which prejudices the registrant in his request for exemption is admittedly a denial of due process.

Title 50, App., United States Code, Section 456, provides for deferments and exemptions from military training and service. Subsection (j) of Section 456 provides in pertinent part:

> "(j) . . . Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for *inquiry and*

hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned . . ." (Emphasis added.)

It is with the "inquiry and hearing" referred to in subsection (j) of Section 456 of the Universal Military Training and Service Act that we are concerned in the present case. Under the authority of subsection (j), the Attorney General has established certain procedures to be followed in the inquiry and hearing to be held by the Department of Justice. Provision is made for an investigation and report by agents of the Federal Bureau of Investigation. These reports are then forwarded to a Hearing Officer for his use in the hearing he conducts with respect to the character and good faith of the claims of conscientious objection of each particular registrant.

Prior to such a hearing, the Hearing Officer mails to the registrant a Notice of Hearing and Instructions to Registrants Whose Claims for Exemption as Conscientious Objectors Have Been Appealed. These instructions provide in part:

"2. *Upon request* therefor by the registrant at any time *after receipt by him of the notice of hearing, and before the date set for the hearing,* the Hearing Officer will advise the registrant as to the general nature and character of any evidence in his possession which is unfavorable to, and tends to defeat the claim of the registrant, such request being

granted to enable the registrant more fully to prepare to answer and refute at the hearing such unfavorable evidence." (Emphasis added.)

Since there is no constitutional right to exemption because of religious training and belief, any claimed denial of due process must necessarily then be based upon a variance from the procedures established by Congress or by administrative officials under a proper delegation of power. The evidence in the present case discloses no request by the appellant for adverse information held by the Hearing Officer. There is no contention that appellant made a request of the Hearing Officer [Tr. p. 23].

Without such a request, there is no duty which can be visited upon the Hearing Officer requiring him to disclose *any* information, either favorable or adverse, to the appellant. It is therefore submitted that there was no error in the refusal of the trial court to receive into evidence the investigative report of the Federal Bureau of Investigation.

United States v. Nugent, 346 U. S. 1;

Elder v. United States, 202 F. 2d 465 (9th Cir.).

VI.

Conclusion.

Appellant was properly classified by the local and appellate boards.

There was no error in the ruling of the trial court in refusing to grant the appellant's Motion for Judgment of Acquittal at the close of evidence.

There was no error of law in the ruling of the trial court in refusing to admit into evidence the investigative reports of the Federal Bureau of Investigation.

It is therefore respectfully submitted that the judgment of conviction should be affirmed.

Respectfully submitted,

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No. 13939

United States Court of Appeals

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WILLIAM JOY BATELAAN,

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vs.

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REPLY BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

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REPLY BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

MAY IT PLEASE THE COURT:

What has been said in the Reply Brief for Appellant in *Joseph David Triff* v. *United States of America,* No. 13952, filed in this Court, will be referred to here rather than repeat what was there said. However, appellant desires to file this his reply brief to brief of appellee.

I.

The appellee emphasizes, at page 7 of its brief, that there

is no constitutional right to exemption from military service. With this appellant agrees. But when Congress has established a statutory exemption or deferment such must be secured in accordance with the act and regulations.

A statutory exemption or deferment must be maintained according to the principles of due process of law. Appellant contends that his rights under the statute have been violated, contrary to the act, the regulations and the requirements of procedural due process.

II.

The argument is made by appellee, at page 7 of its brief, that only those who qualify under the procedure set up by Congress can claim the exemption or deferment. With this the appellant agrees. But the procedure fixed by Congress requires that the draft boards not deny, contrary to fact and law, what the statute guarantees.

III.

Appellee relies, at pages 8-9 of its brief, upon the fact that the board rejected appellant's claim. It is said that such rejection is final because the Selective Service file indicates sufficient basis in fact. The appellee nowhere refers to any material basis in fact for the denial of the conscientious objector status. Accordingly its argument should be rejected.

IV.

At page 9 of its brief appellee says that appellant's being employed in an occupation devoted to the production of war material *per se* entitled the board to deny the exemption.

This ground now urged by the Department of Justice was not urged by the Department of Justice in its recommendation to the appeal board. The Attorney General in his recommendation to the appeal board suggested that Batelaan should be denied his claim for exemption because he was willing to defend himself. This recommendation of

the Attorney General is inconsistent with that made in the case of *Donald Wesley Pitts* v. *United States of America,* No. 14164, filed in this Court. See Government's Exhibit 1 filed in the *Pitts* case. See also Point III in the Reply Brief for Appellant filed in the companion case of *Joseph David Triff* v. *United States of America,* No. 13952, where the recommendation in the *Pitts* case is quoted.

Appellant submits that the present position of the Attorney General in this case, whereby he relies on the employment of appellant in an aircraft factory as a basis for the denial of the conscientious objector status, is a misinterpretation of Section 6(j) of the act. See the opinion of Mr. Justice Douglas on December 10, 1953, in *Roger Dean Clark* v. *United States of America,* 98 L. Ed. 171, which is printed as an appendix to this reply brief. It is to be observed that Congress never provided that the conscientious objections must be to "war in any form." Congress did not hold that a conscientious objector who was not opposed to self-defense and employment in defense work was not a conscientious objector. It is participation in war in any form that is the subject matter of the statutory provision for the conscientious objector. Nothing whatever is said in the act or the regulations or in the legislative history that indicates anything to the effect that if a person is willing to do a certain type of work he cannot be considered a conscientious objector having conscientious scruples to participation in war in any form even though he was willing to perform secular defense work as a means of employment. If the unreasonable interpretation placed upon the act by the trial court and the local board is accepted it will authorize an unending and uncontrollable scope of inquiry. Every type of work and act that may be conceivably thought of can be relied upon to determine and deny the conscientious objector status.

Congress did not intend to allow an inquest to be held as to the kind of work that a registrant did or was willing to do. Congress intended to protect every person who had conscientious objections based upon religious grounds to par-

ticipation in war in any form. Congress did not make the factors relied upon by the trial court and the boards in this case as any basis in fact for the denial of the conscientious objector claim.

Neither the act nor the regulations make the type of work that a person does a criterion to follow in the determination of his conscientious objections. The sole questions for determination of conscientious objection are: (1) Does the person object to participation in the armed forces as a soldier? (2) Does he believe in the Supreme Being? (3) Does this belief carry with it obligations to God higher than those owed to the state? (4) Does his belief originate from a belief in the Supreme Being and not from a political, sociological, philosophical or personal moral code?

Batelaan's case commands affirmative answers to all these questions. He fits the statutory definition of a conscientious objector.

It is entirely irrelevant and immaterial to hold that there was basis in fact because he was willing to work in an aircraft factory. This was not an element to consider and in any event it was no basis in fact according to the law for the denial of his claim. It did not impeach or dispute in any way what he said in his questionnaire and conscientious objector form. The law does not authorize the draft boards to invent fictitious and foreign standards and use them to speculate against evidence and facts that are undisputed. —*Annett* v. *United States,* 205 F. 2d 689 (10th Cir. June 26, 1953); *United States* v. *Alvies,* 112 F. Supp. 618 (N. D. Cal. S. D.); *United States* v. *Graham,* 109 F. Supp. 377 (W. D. Ky.); *United States* v. *Everngam,* 102 F. Supp. 128 (D. W. Va.).

The question of employment and work performed by one who claims to be a conscientious objector becomes material only when the type of work done or agreed to be done by the conscientious objector is of a combatant nature. The Congress of the United States in passing the Universal Military Training and Service Act provides for two kinds of

conscientious objectors. One is a person who has objections only to the performance of combatant service. He is recognized as willing to wear a uniform and do anything in the armed forces except kill or carry a gun. This type of conscientious objector does not have his conscience questioned because of the type of work he is willing to perform even though it may be in the armed forces. No board or official of the government may deny a registrant his conscientious objector claim to the I-A-O classification (limited military service as a conscientious objector opposed to combatant military service only) because of his willingness to perform noncombatant service in the armed forces, thus helping the armed services do a job of killing.

It is submitted also that the conscientious objector to both combatant and noncombatant military service ought not to be denied his conscientious objector classification because of the kind of work he is doing outside the armed services. The law disqualifies no one on such ground. It seems that a reasonable interpretation of the act and the regulations would not make the type of employment that a registrant is willing to do relevant so long as it does not involve combatant or noncombatant military service.

CONCLUSION

It is submitted that the judgment of the court below should be reversed and the appellant ordered acquitted.

Respectfully,

Hayden C. Covington
124 Columbia Heights
Brooklyn 1, New York
Counsel for Appellant

APPENDIX

SUPREME COURT OF THE UNITED STATES

No. ———, October Term, 1953

Roger Dean Clark
v.
United States of America

Application for Bail Pending Appeal

[98 L. Ed. 171, December 10, 1953]

Opinion of Mr. Justice Douglas.

Appellant is a member of Jehovah's Witnesses who claimed the right given by § 6(j) of the Universal Military Training and Service Act, 50 U. S. C. App. § 456(j), to be classified as a conscientious objector. According to the papers before me he indicated that he was by religious training and belief opposed to participation in war but that he was willing to use force in defense of his family or his congregation and that he would work in a defense plant if in great economic need. Nevertheless he was classified I-A and was convicted of refusing to be inducted into the armed forces under § 12(a) of the Act. He has appealed his conviction to the Court of Appeals for the Ninth Circuit and wishes to be set free on bail while his appeal is pending. The District Court and the Court of Appeals have denied bail. I am asked to exercise the power granted me as Circuit Justice by Rule 46(a)(2) of the Federal Rules of Criminal Procedure and grant bail.

Under that Rule bail may be allowed "only if it appears

that the case involves a substantial question which should be determined by the appellate court." The question on the appeal is whether there was a basis in fact for appellant's I-A classification. *Estep* v. *United States,* 327 U. S. 114.

The Court of Appeals denied bail on November 13, 1953. At that time *Dickinson* v. *United States,* 203 F. 2d 336 (C. A. 9th Cir.), still stood. Since that time we reversed that decision. See *Dickinson* v. *United States,* 346 U. S. 389, decided November 30, 1953. Moreover the claim of appellant that he should have been classified as a conscientious objector and the decision of the District Court against him shape up an issue that may turn on whether *Annett* v. *United States,* 205 F. 2d 689, represents the law. In that case the Court of Appeals for the Tenth Circuit held, on facts closely analagous to these, that there was no basis in fact for denial of a conscientious objector classification. The *Annett* decision has recently been followed by the Courts of Appeal for the Second and Eighth Circuits. *United States* v. *Pekarski,* 207 F. 2d 930 (C. A. 2d Cir.), decided October 23, 1953; *Taffs* v. *United States,* 208 F. 2d 329 (C. A. 8th Cir.), decided December 7, 1953. These considerations lead me to conclude that in spite of the great deference I owe the previous determination of this application by the Court of Appeals, the merits of appellant's case cannot now be termed insubstantial. Bail will accordingly be granted in the amount of $2500 as approved by the District Court.

A true copy

Test: HAROLD B. WILLEY,
Clerk of the Supreme Court of
the United States

[SEAL]

By /s/ HUGH W. BARR
Deputy

No. 13940

United States
Court of Appeals
for the Ninth Circuit

JAMES ROLLAND FRANCY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—10-23-53

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

J. B. TIETZ,
257 S. Spring St.,
Los Angeles 12, Calif.

For Appellee:

WALTER S. BINNS,
United States Attorney;

MARK P. ROBINSON,
MANUEL REAL,
Assistants U. S. Attorney,
600 Federal Bldg.,
Los Angeles 12, Calif.

In the United States District Court in and for the Southern District of California, Central Division

No. 22,571-CD

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES ROLLAND FRANCY,

Defendant.

INDICTMENT

[U.S.C., Title 50, App., Sec. 462—Universal Military Training and Service Act.]

The grand jury charges:

Defendant James Rolland Francy, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 85, said board being then and there duly created and acting, under the Selective Service System established by said act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class I-A-O and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on July 10, 1952, in Los Angeles County, California,

in the division and district aforesaid; and at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and neglected to report for induction into the armed forces of the United States as so notified and ordered to do.

A True Bill.

/s/ LAWRENCE L. ROGERS,
Foreman.

/s/ WALTER S. BINNS,
United States Attorney.

ADM:AH

[Endorsed]: Filed November 19, 1952. [2*]

United States District Court for the Southern District of California, Central Division
No. 22,571-Cr.

UNITED STATES OF AMERICA,

vs.

JAMES ROLLAND FRANCY

Indictment [1 Count—for Violation of 50 U.S.C. § 462.]

JUDGMENT AND COMMITMENT

On this 7th day of April, 1953, came the attorney for the government, and the defendant appeared

*Page numbering appearing at foot of page of original Certified Transcript of Record.

in person and with his attorney, J. B. Tietz, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a finding of guilty of the offense of having on July 10, 1952, in Los Angeles County, California, knowingly failed and neglected to perform a duty required of him under the Universal Military Training and Service Act and the regulations promulgated thereunder in that he then and there knowingly failed and neglected to report for induction into the armed forces of the United States as so notified and ordered to do, as charged in the Indictment; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four years in an institution to be selected by the Attorney General of the United States or his authorized representative for the offense charged in the indictment.

It Is Adjudged that execution be stayed until 4 p.m. on Thursday, April 9, 1953, and that the bail of the defendant be exonerated upon surrender of the defendant to the United States Marshal at or prior to 4 p.m. on April 9, 1953.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the

United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ WM. C. MATHES,
United States District Judge.

EDMUND L. SMITH,
Clerk,

By /s/ P. D. HOOSER,
Deputy Clerk.

[Endorsed]: Filed April 7, 1953. [7]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Appellant, James Rolland Francy, resides at 10538 Samoa Avenue, Tujunga, California.

Appellant's attorney, J. B. Tietz, maintains his office at 534 Douglas Building, 257 South Spring Street, Los Angeles 12, California.

The offense was failing to submit to induction, U.S.C. Title 50, App., Sec. 462—Selective Service Act, 1948.

On April 7, 1953, after a verdict of Guilty, the Court sentenced the appellant to four years' confinement in an institution to be selected by the Attorney General.

I, J. B. Tietz, appellant's attorney, being authorized by him to perfect an appeal, do hereby appeal

to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

/s/ J. B. TIETZ,
Attorney for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 7, 1953. [8]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

The following are hereby designated as the record which is material to the proper consideration of the Appeal filed by James Rolland Francy in the above-entitled cause:

1. Indictment.
2. Reporter's Transcript (as requested of Reporter).
3. All Exhibits in evidence or proffered are to be transmitted to the Court of Appeals as provided by Rule 75 (O), R.C.P., and Rule 11 of the U.S.C.A. for the Ninth Circuit.
4. Notice of Appeal.
5. Designation of Record.
6. All Stipulations.

/s/ J. B. TIETZ,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 29, 1953. [10]

In the United States District Court, Southern District of California, Central Division

No. 22,571—Crim.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JAMES ROLLAND FRANCY,
Defendant.

Honorable William C. Mathes, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiff:
WALTER S. BINNS,
United States Attorney, by
MANUEL REAL,
Asst. United States Attorney.

For the Defendant:
J. B. TIETZ, ESQ.

Wednesday, March 18, 1953—2:00 P.M.

(Case called by the clerk.)

Mr. Real: Ready for the Government, your Honor.

Mr. Tietz: Ready for the defendant.

Mr. Real: The defendant is present in court.

The Court: Is that the case you wish to try first, Mr. Tietz?

Mr. Tietz: Yes, sir.

The Court: Very well, we will mark it "ready" and continue the call of the calendar.

(Interruption for other court proceedings.)

The Court: May I see the file in the Francy case? It appears from the file in No. 22571—first, is it stipulated in this case that the defendant is present, gentlemen?

Mr. Real: So stipulated, your Honor.

Mr. Tietz: So stipulated.

The Court: It appears from the file that there has been a waiver of trial by jury and a waiver of special findings of fact approved and filed on January 5, 1953. Does the defendant still wish to proceed without a jury?

Mr. Tietz: Yes, your Honor.

The Court: Very well, you may proceed.

Mr. Real: Your Honor, the Government will waive its opening statement at this time. [3*]

The Government calls as its first witness Mrs. Mary B. Lewis.

MRS. MARY B. LEWIS

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Mrs. Mary B. Lewis.

The Clerk: L-e-w-i-s?

The Witness: Right.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Mrs. Mary B. Lewis.)

Direct Examination

By Mr. Real:

Q. Mrs. Lewis, what is your occupation?

A. I am clerk of the Burbank group, in charge of the Burbank group.

Q. Do you recognize the defendant here on trial, James Rolland Francy? A. Yes, I do.

Q. Is he a registrant of your Local Board?

A. He is a Local Board registrant of 85.

Q. You brought with you certain records today, is that correct? A. Yes.

Mr. Real: May I have them, please? We ask that the Selective Service file of James Rolland Francy be marked as Government's 1 for identification, your Honor. [4]

The Court: Is that a file which the witness has just presented?

Mr. Real: Yes, it is.

The Court: Is that the Selective Service file of the defendant?

The Witness: It is.

The Court: It will be marked Government's Exhibit 1 for identification.

May it be stipulated it is the file?

Mr. Tietz: This case is a little unique in that respect, your Honor.

The Court: Very well.

Q. (By Mr. Real): I place before you, Mrs. Lewis, Government's Exhibit 1 for identification and ask you if you have seen that file before?

(Testimony of Mrs. Mary B. Lewis.)

A. Yes.

Q. And what is that file?

A. That is the Selective Service file of James Rolland Francy.

Q. And, as clerk of Local Board 85 are you legal custodian of that file? A. Yes.

Q. Is that file kept in the normal course of Local Board No. 85's business? Is it the normal course of Local Board No. 85's business to keep that record? [5] A. Yes.

Mr. Real: Your Honor, at this time we move that Government's Exhibit 1 for identification be introduced into evidence.

The Court: Is there objection?

Mr. Tietz: The defendant objects. It has not been established that this witness is the one that had control of that file so that she, of her own knowledge, can be certain that it is in all respects a true and correct file of this registrant.

The Witness: It is the file that has been kept for that registrant. We do have some out—an out-file that has some letters that presumably that have come in after the file was photostated, and that is all I have besides the file that you have.

Mr. Tietz: Possibly your Honor could rule on the objection subject to cross-examination, and then take up the matter as to whether this file should be introduced. Maybe it will bring out in several respects it is not correct.

Mr. Real: May the Government be heard, your Honor?

(Testimony of Mrs. Mary B. Lewis.)

The Court: From the face of it, it is admissible on the witness' foundational testimony.

Mr. Real: That is correct, your Honor. The witness has said she is the legal custodian, and that is all that is necessary under the rules of evidence.

The Court: Do you wish to cross-examine this witness? [6]

Mr. Tietz: Oh, yes.

The Court: The objection is overruled and Exhibit 1 for identification is received into evidence. Had you completed your direct examination?

Mr. Real: Yes, I have, your Honor. You may cross-examine.

The Court: You may cross-examine, Mr. Tietz.

The Clerk: Government's Exhibit 1 admitted into evidence.

Cross-Examination

By Mr. Tietz:

Q. Does Government's Exhibit 1 contain in it a letter from Col. Hartwell of the Selective Service System throwing doubt on whether or not the registrant had been classified in accordance with the regulations, particularly in that he had not been reclassified after the personal appearance of February the 8th, 1951?

Mr. Real: Your Honor, I am going to object to that question on the ground that it is incompetent and that it calls for the conclusion of this witness; and further, that the file is the best evidence of whether that letter is there or not.

(Testimony of Mrs. Mary B. Lewis.)

The Court: Isn't the objection good on the last ground?

Mr. Tietz: The last ground is a very good one, but it will help us if the witness can tell us if there is that or an equivalent expression in there from Col. Hartwell. [7]

The Court: I will overrule the objection. You may answer it, if you can.

The Witness: Well, I haven't got the file here. If you want me to look through it——

The Court: Mr. Clerk, will you please place Exhibit 1 before the witness?

The Clerk: Yes, your Honor.

A. No, there is no such letter in this file.

Q. (By Mr. Tietz): In Exhibit 1; that is what you are referring to?

A. The registrant's Selective Service file.

Q. Isn't it a fact that the Local Board No. 85 received such a letter from Col. Hartwell expressing such a sentiment?

A. Well, I can look through the out file. I wouldn't know. I haven't looked through the out file.

Q. Will you do that, please?

A. That was of the date it was photostated, and then I have the out file.

Q. You mean that all the papers in this registrant's file were not sent for photostating?

A. Well, not if they were received afterwards.

Q. Aren't there some papers in Exhibit 1 that

(Testimony of Mrs. Mary B. Lewis.)

were received afterwards, whatever "afterwards" means?

A. What is the date of the photostating certification? The date it was sent I will have to look.

The Court: In other words, Exhibit 1 is not the complete file up to date, is that correct?

The Witness: After it was photostated, anything that came in after the file was photostated we did not place in the file because that was supposed to be a photostatic copy.

The Court: Can you give us that date?

Q. (By Mr. Tietz): I will place before you a black and white photostat. Could you tell us the date of the photostating?

A. I can't tell you the date of the photostating. I can tell you probably the date it was sent for photostating.

The Court: The question is: Do you have some material that constitutes, properly, a part of the Selective Service file of this defendant which is not in Exhibit 1? Do you understand my question?

The Witness: It was sent to Sacramento on November 3, 1952 for photostating.

The Court: Do you have any material in your possession which properly belongs to the Selective Service file of this defendant which is not now in Exhibit 1, the folder before you?

The Witness: This is the folder.

The Court: You have not answered my question.

The Witness: This is it. This is all I have.

The Court: You do have some, is that correct?

(Testimony of Mrs. Mary B. Lewis.)

The Witness: Yes. [9]

The Court: Very well. It should be in that file, should it not? It should be placed in Exhibit 1?

The Witness: Yes.

The Court: In other words, what we are after is the complete Selective Service file of this defendant. I understood Exhibit 1 is offered as a complete Selective Service file, is it not, Mr. Real?

Mr. Real: It is offered as the Selective Service file of James Rolland Francy. Now, I don't know what——

The Court: The witness states she has some other material which has come in since November that properly should be in Exhibit 1. Is there any objection to her now placing these in Exhibit 1?

Mr. Real: No objection from the Government, your Honor.

The Court: Is there any objection on the part of the defendant?

Mr. Tietz: None.

The Court: Will you place that, Mrs. Lewis, and incorporate it into Exhibit 1, whatever belongs there, so the Selective Service file of the defendant will be complete up to date?

The Witness: That is it, yes.

The Court: Now, have you done so? Your answer?

The Witness: Yes, sir.

The Court: The reporter cannot get it if you just shake your head. [10]

The Witness: Yes, that is right.

(Testimony of Mrs. Mary B. Lewis.)

The Court: Any further questions of this witness?

Mr. Tietz: Yes, sir.

Q. Mrs. Lewis, I am going to show you a card labeled Registration Certificate and I have just shown it to Mr. Real. Will you please examine it? Can you tell us what that is?

A. It is his registration card, Form 2.

Q. That was given to Mr. Francy when or at what occasion?

A. It was given to him May 8 of '50 on the occasion of his registration for Selective Service.

Q. That shows he is a registrant of what board?

A. Well, it doesn't show what board he is a registrant of, except that his place of residence on line 2 places him within the jurisdiction of Local Board——

Q. That is not the question I asked you right now, Mrs. Lewis. Doesn't it show what board he is a registrant of? A. No.

Q. What does it say there about board?

A. Well, it says the registrar for Local Board 87 registered him.

Q. Now, what does that mean?

A. It means that the registrar who registered him was a registrar for Local Board 87. [11]

Q. Will you explain to us how he was processed by Local Board No. 85?

A. Well, his home address as given on line 2 for the registration card was within the jurisdiction of Local Board No. 85, therefore, the card,

(Testimony of Mrs. Mary B. Lewis.)

original Form 1 of the registration, was put into 85.

Q. Now, would you please look at page 26 of Exhibit 1? A. Yes.

Q. That purports to be——

The Court: What you have handed the clerk, Mr. Tietz, is a photostatic copy of the Selective Service file, Exhibit 1?

Mr. Tietz: It is a photostatic copy of what has been placed in as Exhibit 1, with the exception of the so-called out file.

The Court: Now, that has been included, has it not, Mrs. Lewis?

The Witness: Yes.

The Court: By you while on the stand the so-called out file has been incorporated into Exhibit 1 and has become a part of the Selective Service file.

Mr. Tietz: Yes, sir. I thought the court might—

The Court: So this photostatic copy, I take it, is complete up to a date in November when the witness testified the file was sent out for photostating. Is that correct? [12]

The Witness: That is correct.

Mr. Tietz: Complete in the sense that it is a photo-copy of Exhibit 1 up to that point?

The Court: Yes. Is that agreed, Mr. Real?

Mr. Real: That is agreed, your Honor.

The Court: Very well.

Q. (By Mr. Tietz): Will you look, Mrs. Lewis, at page 26 and tell us what that page is?

A. It is a record of personal appearance of the

(Testimony of Mrs. Mary B. Lewis.)

registrant when he appeared before the board, No. 85.

Q. Who made that?

A. It was made by the clerk of the board. As a rule they make them. I don't know that she made it, but she was a clerk of the board. The clerk of the board has charge of making these records.

Q. Then you do not know who made it?

A. It was the clerk of the board. That is her job, that is all I know. I have instructed her to make a record of all appearances.

Q. Do you know if that sheet, page 26, is the summary of the personal appearance hearing that went to the appeal board when this defendant took a Selective Service appeal on the grounds that he was a conscientious objector? A. Yes.

Q. Do you know that of your own knowledge?

A. Well, I reviewed these files before they go to the appeal board. The clerk brings the files to me and I review them, you see, and I cannot remember this individual one when I sent it to the appeal board; but the record of the appearance is in there and that is the record before it goes to the appeal board. The record is in there.

Q. That is the usual practice, isn't it?

A. Yes.

Q. And that is what you are really testifying to, isn't it? A. Yes.

Q. Is there any way that you can look at the original Exhibit 1 or the photostat and, by any

(Testimony of Mrs. Mary B. Lewis.)

markings or anything, any typographical error, or in any way testify that you know that particular version of a personal appearance hearing summary was the one that was sent to the appeal board?

A. No, there isn't any way that I could tell that that is the one that was sent to the appeal board.

Q. In the out file, what you have termed the "out file," which I have not yet seen, can you tell me if there is any correspondence or copies of correspondence between your registrant Francy and the hearing officer, the Department of Justice Hearing Officer? A. No, not in the out file.

Q. Do you know if the clerk of that particular board [14] ever had any copies or the originals of any correspondence between the hearing officer and this defendant, your registrant James Rolland Francy?

A. Well, I am pretty sure she didn't, because I would have seen any correspondence like that that ever came in the office. The mail goes over my desk, and anything like that would be a rather unusual circumstance and I would have noted it. I have never seen any correspondence from any hearing officer after an appeal went to the appeal board.

Q. In this case, or in any case you mean?

A. I would say no, there has never been any.

Q. In any case, or in this case?

A. In this case.

Q. You have seen files that have gone to appeal boards that have come back from the appeal board

(Testimony of Mrs. Mary B. Lewis.)

that have had correspondence between the hearing officer and the registrant, have you not?

Mr. Real: Your Honor, I will object to that question as irrelevant and immaterial to the issues of this case.

The Court: Overruled.

Mr. Real: She has already testified that she saw no letter concerning this case.

The Court: Overruled. You may answer.

A. No, sir.

The Court: You may answer. [15]

A. No, I have never seen any correspondence from any clerk to or from the hearing officer.

Q. (By Mr. Tietz): Not the clerk, the registrant.

The Witness: What was the question, please?

The Court: Correspondence between the registrant and the hearing officer; is that your question?

Mr. Tietz: Yes, sir.

The Court: Have you ever seen any such in any case?

The Witness: Well, not while it was at the appeal board. There may be some in here after it comes back from the appeal board, between the registrant and the hearing officer. There may be. I haven't looked at this file, but that would be known to me—the hearing officer and the registrant, it would be their business transaction and I probably would not pay any attention to it if there was.

Q. (By Mr. Tietz): Your title is "Co-ordinator," is it not? A. Yes.

(Testimony of Mrs. Mary B. Lewis.)

Q. You are in charge as a sort of head clerk of all the boards in that office?

A. In the Burbank group, yes.

Q. There are four or five in that group?

A. Five.

Q. Five.

And this particular board has its own clerk? [16]

A. That is right.

Q. She is a full-time employee, isn't she?

A. Yes.

Q. Does she have an assistant?

A. Not a full-time assistant, no.

Mr. Tietz: That is all.

The Court: Any redirect?

Mr. Real: There will be no redirect, your Honor.

The Court: You may step down. What you have now handed the clerk is a complete file, Exhibit 1?

The Witness: Yes.

The Court: The next witness for the Government.

Mr. Real: With that witness, your Honor, the Government will rest its case.

The Court: The defense.

Mr. Tietz: The defendant would like to make a motion for acquittal on several grounds at this time.

The Court: You may.

Mr. Tietz: The first point that we wish to present is that the file, the Exhibit No. 1, on its face shows an arbitrary classification. I shall go into

that only briefly because your Honor has heard most of my argument on that subject in other cases.

(Argument omitted from transcript upon request of counsel)

Now, my second point, I will invite the court's attention [17] to page 51 of the Exhibit 1. That is the most serious document, perhaps, in a way, that comes to a registrant. It is the only one, I believe, that is ever sent to him in the name of the President of the United States. That is the Selective Service form 252, the Order to Report for Induction.

Now, I will take quite a bit of time on this point, your Honor; first, because it is a good serious point.

The Court: State your position and then I can determine better whether we should take much time with it or not. What is your position?

Mr. Tietz: Not executed.

The Court: You have raised that point in other cases.

Mr. Tietz: I have raised that point in other cases and I will be raising it again because the circumstances are different. I expect to raise it, at least for the record, in two other cases this afternoon that differ from this. Each one differs from the other, by a curious coincidence.

The Court: And your point here is, I suppose, the name "Joseph Fries Member of Local Board" is typed and not signed?

Mr. Tietz: Correct.

The Court: You need to do nothing more than

just state it. I have it under submission here in one case of yours, have I not?

(Argument omitted.)

Mr. Tietz: Now, my next point is that the record showed that after [18] the personal appearance hearing of February 8th, 1951, there was a grave procedural mistake in that there was no reclassification anew. That is why I had in mind Col. Hartwell's concern.

(Argument Omitted.)

Now, I will later, after I put testimony on, show that is not the summary. But taking it as it is, it shows, first, that there was no reclassification, which in itself is a grave mistake.

Then the file shows that after that there was no Form 110 sent, which is a notice, a postcard notice. And while it might be argued that he was not prejudiced, it is my position that there was a jurisdictional mistake and that the Knox and the Stiles cases support that.

Then the next point in connection with the personal appearance hearing and summary itself is that that is not any summary. It is just a minute order. He is entitled to a summary. I might state that was the position that Judge Yankwich took about 10 days ago. It was his very expression: "It is a minute order."

Now, my next point is that the advisory opinion of the hearing officer upon which the Attorney General relied and upon which the appeal board ap-

parently relied—certainly it influenced them—regardless if there is any showing of reliance by the appeal board, it was there, and there are [19] cases that say that anything that is in the file that is improper that could have influenced them, that that is bad.

Pages 44, 45, and 46 are the pages in Exhibit 1 of the advisory opinion of the hearing officer.

And my point in connection with that is, very briefly, this: It is inconsistent with itself. The body of the report says he is a very good boy, altogether a good boy, and then there is a non sequitur in the conclusion, therefore, he should not get what he asks.

Now, that concludes the points that we want to make at this time. I could amplify them, of course, your Honor, argue them, but I think your Honor understands the particular ones that I have raised.

The Court: On the question of sufficiency of the summary of the personal appearance, have you seen the decision of the Court of Appeals in Dickinson vs. United States?

Mr. Tietz: Yes, sir.

The Court: Decided March 9th last.

(Argument omitted.)

The Court: The motion for a judgment of acquittal will be denied.

Mr. Tietz: The defendant will take the stand.

Defendant's Case in Chief

JAMES ROLLAND FRANCY

the defendant herein, called as a witness in his own behalf, [20] being first sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?
The Witness: James Rolland Francy.

Direct Examination

By Mr. Tietz:

Q. You are the defendant in this case?

A. I am.

Q. I am going to direct your attention to the personal appearance you had before Local Board No. 85 on February 8th, 1951, and to the summary that is in Exhibit 1 at page 26. You have looked at that summary today? A. Yes, sir.

Q. Did you look at your Local Board file in the office of the Local Board on more than one occasion? A. I have.

Q. When was the first time that you looked at your file that you can recall, approximately, in relation to some other event?

A. The first time, looking at the complete file, was upon the receipt of my order to report for induction.

Q. At that time did you look at what was termed or what appeared to be the summary of the personal appearance hearing? A. I did.

Q. Was it like this page 26 that we now have in Exhibit [21] 1? A. No. It differed.

(Testimony of James Rolland Francy.)

Q. Then you can say that that particular sheet was not the one that you saw after you got your order to report for induction?

The Witness: Would you restate that, please?

Mr. Tietz: May I ask the reporter to read the question?

The Court: Please read it, Mr. Reporter.

(Question read by reporter.)

A. I can.

Q. (By Mr. Tietz): Does page 26 of Government's Exhibit 1 contain material that was not in the original sheet you saw? A. Yes, it does.

The Court: What?

The Witness: In its opening statement, opening statement or statements, it states that I was denied a IV-E classification as well as—let me see.

The Court: Would it be helpful to you to have the clerk place Exhibit 1, page 26, before you?

The Witness: It would.

The Court: Please do so, Mr. Clerk.

The Witness: This "Local Board refused re-classification and informed registrant"—well, that first part was absent in the original copy.

The Court: Which part? [22]

The Witness: "Local Board refused re-classification." No mention was made of any refusal or granting re-classification.

The Court: Anything else?

The Witness: There may have been a rephrasing of the first sentence: "Registrant requested IV-E classification instead of I-AO."

(Testimony of James Rolland Francy.)

The Court: "Instead of I-AO"?

The Witness: No. In my recollection of my appearance, I was not allowed—well, that didn't come out. I mean the appearance was so brief.

The Court: At the time you appeared before the Local Board had you been placed in classification I-AO?

The Witness: I was.

The Court: And what request did you make of the Local Board?

The Witness: At the personal appearance?

The Court: Yes.

The Witness: They didn't get that far.

The Court: Why were you there before them? Did you tell anyone——

The Witness: Well, that was the question that the board member posed, and I said I was there to aid them in the consideration of my claim.

The Court: Did you claim to be in Class IV-E?

The Witness: Yes, sir.

Q. (By Mr. Tietz): Now, what you have just related in answer to the court's query was the sum and substance of what you got to say, or was there more to it, at the personal appearance hearing?

A. I don't believe I understand your question.

Q. When you came to the personal appearance hearing what was the first thing that was said to you?

Mr. Real: Your Honor, I will object to that on the grounds that it is irrelevant and immaterial to the issues of this case.

(Testimony of James Rolland Francy.)

Mr. Tietz: One of the issues, your Honor, is whether that is a correct summary.

The Court: The objection is sustained.

Q. (By Mr. Tietz): Did you at the personal appearance hearing attempt to make some explanations and were cut off?

The Court: Explanations of what?

Q. (By Mr. Tietz): Of your position with respect to your claim as a conscientious objector?

Mr. Real: Your Honor, I will object to that question on the same grounds, irrelevant and immaterial to the issues of this case.

The Court: Sustained.

Q. (By Mr. Tietz): Did you attempt to introduce any evidence at the personal appearance hearing? [24]

Mr. Real: Your Honor, the same objection.

The Court: Sustained.

Q. (By Mr. Tietz): Did you attempt to bring anything before the Local Board that is not reflected by this summary of the personal appearance hearing?

A. No. I intended to, as my correspondence I directed to the board, intended to help them in going over my file and answering any questions that I felt that I could orally support my claim much better. I mean I could aid them in the consideration of my claim much better than any written correspondence.

Mr. Real: Your Honor, I will move to strike all

(Testimony of James Rolland Francy.)

that except the answer "no" as non-responsive to the question.

The Court: It is explanatory of the answer. Motion denied.

Q. (By Mr. Tietz): Did you attempt to discuss your file with the Local Board at that personal appearance hearing?

A. Yes, but I was—the hearing was terminated before any discussion was allowed.

Q. How did you attempt to discuss your file?

A. Well, after the board member posed the question almost identical to the question his Honor asked me, upon my answer that I wished to aid the board in their consideration of my claim, one of the board members interrupted and said, "Well"—oh, a clerk came forward, spoke up and [25] informed me that if I disobeyed any order of the draft board, that I was liable to imprisonment and fine. And I said I had knowledge of that. And then the board member said, "Well, in that case, we are not a high enough board to construe your claim."

Q. Then what occurred?

A. Well, the meeting broke up.

The Court: Did you offer to supply the board with any new information not theretofore included in your file with respect to your claim as a conscientious objector?

The Witness: Well, I felt my presence there——

The Court: No, not what you felt.

The Witness: Well——

The Court: Did you offer to supply any further

(Testimony of James Rolland Francy.)

information, any new data of any kind, new material or new information not theretofore presented to them?

The Witness: No, I did not, other than——

The Court: In other words, your Conscientious Objector form that you filed and the sheets appended thereto fully set forth your claim of conscientious objection?

The Witness: I believe that any such a brief statement is inadequate to support a lifetime of teaching on such a subject. I felt my presence at the board would aid and clarify the points brought up. I don't expect anybody to feel the way I do upon reading my file. I mean that is a matter [26] of years.

The Court: Any further questions of Mr. Francy on direct?

Mr. Tietz: Not with respect to the personal appearance hearing.

Q. But, with respect to the hearing you had before the hearing officer, did you have any correspondence with the hearing officer before the hearing? A. I did.

Q. Give us the nature of it.

A. I requested adverse information, as a certain mimeographed form I received stated I could.

Q. When did you make such a request?

A. Prior to the hearing.

Q. Did you receive a reply?

A. Yes, I did.

Q. I will hand you a letter signed "Mae Carvell,

(Testimony of James Rolland Francy.)

Hearing Officer, Southern District of California," on the stationery of the United States Attorney dated January 11, 1952. Can you identify that for us further?

A. Yes, I can. That is the reply to my reques for adverse information.

The Court: Do you offer it in evidence?

Mr. Tietz: We do.

The Court: Received into evidence. [27]

Mr. Tietz: As Defendant's Exhibit A.

The Clerk: Defendant's Exhibit A received into evidence.

The Court: Please mark it, Mr. Clerk.

Q. (By Mr. Tietz): At the hearing before the Hearing Officer what occurred with respect to any disclosure of the FBI report or FBI material?

Mr. Real: Your Honor, I will object to that question as no proper foundation.

The Court: The question is very broad. I suggest you rephrase it.

Mr. Tietz: I will withdraw it, your Honor.

Q. You did have a hearing before the hearing officer, Mae Carvell, at some time subsequent to receipt of this letter dated January 11, 1952?

A. I did.

Q. About when was it, do you recall?

A. January 17th or 18th.

Q. At that hearing did you have a conversation with Mrs. Carvell? A. I did.

Q. Did she comment that she had an investigative report of the Federal Bureau of Investigation?

(Testimony of James Rolland Francy.)

A. I missed the first part of that question.

Mr. Tietz: May it be read, your Honor?

(Question read by the reporter.) [28]

A. Well, it was evident she was reading from it.

The Court: Did she say——

The Witness: She quoted from it.

The Court: Did she say she had a report? That is the question.

The Witness: Yes.

Q. (By Mr. Tietz): What did she do with the report?

A. She referred to it and quoted from it.

Q. Did you do anything with respect to the report?

A. Well, I reached for it and asked to see it.

Q. Then what happened?

A. She said, "No. It is for my reference only."

The Court: Did you ask her if she had any adverse information or unfavorable evidence with respect to your conscientious objection claim?

The Witness: Not in those words.

The Court: Well, did you ask her in that sense? You had written her previously asking for it.

The Witness: Yes.

The Court: She wrote back, as shown in Defendant's Exhibit A, and said in effect she would give it to you before the hearing proceeded. When you arrived there for the hearing did you have a conversation with her in pursuance to this correspondence?

The Witness: Well, I asked for the report. [29]

(Testimony of James Rolland Francy.)

The Court: Did you ask her if she had any un favorable information?

The Witness: I don't recall. I don't believe I did.

Q. (By Mr. Tietz): Did she say anything to you with respect to her conclusion, whether she was recommending your claim be sustained or not?

A. She did.

Q. What did she say?

A. Well, she—it was in answer to my question what would happen from then on, and she said that she would send her recommendation to the Department of Justice, which would be that my claim be sustained.

Mr. Tietz: You may cross-examine.

The Court: Did she say in what classification

The Witness: That my claim—which my claim was for IV-E.

The Court: For IV-E?

The Witness: Isn't that the old I-O?

The Court: And that was the claim you were speaking to her about?

The Witness: Yes.

The Court: Any cross-examination?

Mr. Real: Yes, your Honor. [30]

Cross-Examination

By Mr. Real:

Q. Now, Mr. Francy, you say in answer to your counsel's question that you looked at the complete file after your order to report for induction was mailed to you, is that correct?

(Testimony of James Rolland Francy.)

A. Yes. I examined the contents of this exhibit I have before me.

Q. Is that the first time you ever saw the exhibit? A. No, it is not.

Q. When is the first time you ever saw the exhibit?

A. Well, I don't recall the first time. One time was at the personal appearance hearing. I didn't examine it fully. That was the first full examination I made of the file.

Q. When did you see it the next time?

A. Shortly after my—shortly after the indictment was brought against me.

Q. Between your personal appearance and the time you were ordered to report for induction you did not see the file?

A. No, I don't believe I did.

Q. So your testimony is that you saw the file only three times, is that correct?

A. Three positive times. The other times—I have [31] been to the board many times. I examined the file fully twice.

Q. You examined it, you say, twice. When was the first time you examined it fully?

A. After the receipt of my order to report for induction.

Q. And at that time you did not see the form that it is in now, is that correct?

A. That is correct.

Q. Now, I want to get one thing straight. I did not quite get your answer when you saw it the first

(Testimony of James Rolland Francy.)

time. Was it before your personal appearance o after it?

A. My file was on the table at the time of th personal appearance. Later on, I suppose about year and a half later, after my order to report fo induction, I examined the file in full at that time and the last time was after the indictment wa brought against me.

Q. And subsequent to your personal appearanc and to your order to report for induction you neve went to the board and asked to see your file, is tha correct? A. I was there today again.

Q. I mean from the time of your personal ap pearance, which was on February 8th of 1951, unti you were ordered to report for induction?

A. No, I can't say that for sure.

Q. Then you might have seen the file? [32]

A. I might have.

Q. Between that time? A. Yes.

Q. And did you ever on the occasions that you might have seen the file see this particular page in the file?

A. No, I made no notice of it. I mean I have no recollection.

Q. Do you recall ever seeing any summary as your personal appearance in the file?

A. My first recollection is at the time I stated after my order to report for induction.

Q. That is the first time that you saw this par ticular page? A. My first recollection.

Q. Was the page in the same form as it is here?

(Testimony of James Rolland Francy.)

A. Not at that time.

Q. Then you can't state, with any knowledge, that this is not the summary that went to the appeal board, is that correct?

A. No, I should think I could. I think that this form, as I see it here, this page 26, has been changed or is not—in fact, the page itself is larger from between the period of time of my order to report for induction and until the time this indictment was brought against me.

Q. This file went to the appeal board on March 14 of [33] 1951. You were ordered to report on June 20 of 1952? A. Yes.

Q. So you can't say that at the time this file went to the appeal board that this particular summary, that this page was not in the file, is that right?

A. I can say I have examined the file thoroughly twice. My first examination of the file revealed that this is not the form that was in the file at the time.

The Court: By "this" you are referring to page 26?

The Witness: Yes, sir.

The Court: And when did you next examine the file?

The Witness: After the indictment was brought against me.

The Court: Was that page 26, now before you, in the file at that time?

(Testimony of James Rolland Francy.)

The Witness: It was.

The Court: So you do not know what the state of the file was in the interval between those two examinations, is that it?

The Witness: Not between those two; no, sir.

The Court: Put your next question.

Mr. Real: No further questions, your Honor.

Mr. Tietz: No redirect.

The Court: You may step down, Mr. Francy.

Mr. Tietz: The defense would like to have the FBI report. Have we a stipulation on that, Mr. Real? Can we make [34] one, or should we put Mr. Carson on the stand?

Mr. Real: Your Honor, the Government will stipulate that the manila envelope that I have, containing one report dated 5-2-51, is the report that Mr. Carson was ordered to bring to this court pursuant to your Honor's order concerning these FBI reports in these cases.

The Court: Do you stipulate that the envelope contains a full, true and complete copy of the investigative report made by the Federal Bureau of Investigation concerning the conscientious objector claims of this defendant, and that this report——

Mr. Real: I have a complete stipulation to that, yes, your Honor, that I will make as soon as this is marked.

The Court: Do you accept the stipulation thus far stated?

Mr. Tietz: Yes, with one little qualification. I would like to ask one question of the witness.

The Court: Just a moment, now. The report will be marked Exhibit B for identification. Has it been delivered to the clerk under seal?

Mr. Real: It has, your Honor.

The Court: It may remain under seal pending further order of the court.

The Clerk: Your Honor, it is under seal but the seal is broken. [35]

The Court: Reseal it, Mr. Clerk. It is intended to be delivered under seal, I take it?

Mr. Real: It is, your Honor. I did not notice that the seal was broken.

If we may have a stipulation now concerning the report, I think we will have this complete, except for Mr. Tietz's examination of the witness.

The Court: Is there a claim of privilege concerning this report?

Mr. Real: In this particular report, your Honor, there is no claim of privilege.

The Court: There is no necessity of sealing it, then.

Mr. Real: There is none. Our only objection will be, of course, the normal objection of irrelevancy and immateriality.

The Court: Does the Government waive the privilege of executive order 3229 with respect to this report?

Mr. Real: With respect to this particular report we do, your Honor.

The Court: Is there any occasion to question Mr. Carson?

Mr. Tietz: I have not seen it.

The Court: The document will be unsealed and will be treated as any other exhibit in the case, only it has not been offered into evidence as yet. It is marked for identification and you may examine it. Is there any necessity of [36] calling Mr. Carson now?

Mr. Tietz: It will take me just two minutes, with the Court's indulgence, to look at this report, and then I want to ask some questions.

The Court: Will the Government complete its offer of a stipulation?

Mr. Real: Your Honor, may it be stipulated that the Defendant's Exhibit B for identification is a true and accurate copy of the complete investigative report made by the Federal Bureau of Investigation concerning the conscientious objector claims of the defendant, James Rolland Francy?

That Defendant's Exhibit B was forwarded by the representative of the Federal Bureau of Investigation, so designated, for the purpose, to the office of the United States Attorney?

That Defendant's Exhibit B was forwarded by the office of the United States Attorney to the Hearing Officer designated by the Department of Justice to hear the conscientious objector claims of the defendant, James Rolland Francy, as provided in Section 6 (j) of the Universal Military Training and Service Act and Selective Service Regulation 1626.25?

That Defendant's Exhibit B is the investigative report that was in the possession of the Hearing Officer prior to the hearing held to determine the

validity of the conscientious objector claims of the defendant, James Rolland Francy, and [37] was used and referred to by the Hearing Officer in the recommendation she prepared and sent to the Department of Justice concerning conscientious objector claims of the defendant, James Rolland Francy, as provided in Section 6 (j) of the Universal Military Training and Service Act and Selective Service Regulation 1626.25?

The Court: Does the Government offer so to stipulate?

Mr. Real: So offered, your Honor.

The Court: Do you accept the stipulation for the defense?

Mr. Tietz: We would like to see it first, your Honor. May we look it over? We have an intimation that it may or may not include a certain bit of material that came out. If we could have a few minutes?

The Court: You may examine it. We will take the afternoon recess at this time.

(Short recess.)

The Court: In No. 22571, the case at trial, United States v. Francy, is it stipulated the defendant is present?

Mr. Tietz: Yes, sir.

Mr. Real: So stipulated, your Honor.

Your Honor, before we proceed, I would like to make the Government's position clear as to the waiver in this particular case, that is, of the Attorney General's order. The FBI has contacted all of

the people who made statements to the FBI concerning conscientious objector claims of this [38] defendant. They have been contacted and they have consented to allow their names to be disclosed; further, that they would be willing to come and testify if they were called. And that is the reason that the Government will waive the privilege of 3229 in this particular case, your Honor.

The Court: I assume there is nothing in the nature of state secrets or anything contained in Exhibit B for identification which would violate the public policy against a disclosure of the confidential informants?

Mr. Real: No. We have contacted those informants and they are willing to have their names disclosed.

The Court: Have you read Defendant's Exhibit B for identification, Mr. Tietz?

Mr. Tietz: Yes, your Honor.

The Court: Do you join in the stipulation proposed prior to recess?

Mr. Tietz: Yes.

The Court: I am glad the Attorney General has thought he could waive the privilege in this case, or in any case, so counsel would have an opportunity to see how thoroughly innocuous these reports can be. Of course, when anything is concealed it heightens interest in the contents of it.

Mr. Tietz: Yes, sir. The very point that we were concerned about.

The Court: I have made it clear throughout, that any [39] time there was anything in one of these

reports that I deemed of any proper evidentiary value to the defense, then the Government will be given the choice of either making the report available or dismissing the case.

Do you wish to offer the report in evidence?

Mr. Tietz: Yes.

The Court: Is there objection?

Mr. Real: Your Honor, as to the offer in evidence we will object on the grounds it is irrelevant and immaterial to the issues of this case.

The Court: What is the purpose of the offer?

Mr. Tietz: The purpose of the offer is to support the argument that we made and that we wish to renew, that the conclusion of the hearing officer and her recommendation was arbitrary and that the evidence is all one way; the evidence all is that he has religious training and religious belief and so on.

The Court: I could not admit it on that ground for that purpose. But if there is any possible contention that there is adverse information in that report which the hearing officer did not disclose as requested, it might be admissible on that ground. It would be relevant to that issue.

Mr. Tietz: There was only one point.

The Court: Do you wish to offer it for that purpose?

Mr. Tietz: Yes, your Honor. [40]

Mr. Real: Your Honor, if he offers it for that purpose, we will object on the ground there is no proper foundation for that offer on that particular point.

The Court: Isn't the foundation here? Wherein is the foundation lacking?

Mr. Real: It is lacking in that this defendant did testify that the hearing officer gave him some information, but not that she denied him any information that was adverse or detrimental to his stand as a conscientious objector.

The Court: Isn't the foundation here that this defendant did request all adverse information?

Mr. Real: That is correct, your Honor.

The Court: And he made a timely request, and hence was under the regulations or under the instructions, which are not in evidence in this case for some reason. You did not see fit to offer them the instructions which were given.

May it be stipulated what the instructions to the registrant here were prior to the hearing?

Mr. Tietz: Yes, it may be stipulated that the——

The Court: Do you have a copy of that form?

Mr. Real: I do not have one in this particular case, your Honor. We were running short of those copies and we have to have some more made, and that is the reason.

The Court: Do you have a copy of any of them so you could offer a stipulation? [41]

Mr. Real: No, your Honor. I think I can offer the stipulation. I know most of the content.

The Court: I have a sample copy that was given me in the Tomlinson case, No. 22461. May it be stipulated that paragraph 2 of the instructions sent to this defendant by the hearing officer prior to the hearing read as follows:

"Upon request therefor by the registrant at any time after receipt by him of the notice of hearing and before the date set for the hearing, the hearing officer will advise the registrant as to the general nature and character of any evidence in his possession which is unfavorable to, and tends to defeat, the claim of the registrant, such request being granted to enable the registrant more fully to prepare to answer and refute at the hearing such unfavorable evidence."

May it be stipulated that that provision was included in the instructions, written instructions sent by the hearing officer in this case to this defendant as registrant some days prior to the hearing?

Mr. Real: So stipulated, your Honor.

Mr. Tietz: The defendant so stipulates.

The Court: Now, the request was made. The corollary issue in the case may be whether that request was complied with.

Mr. Real: That is correct, your Honor. I think here, now [42] that we have the report before us, we have reached actually the point that we tried to raise before concerning the Morgan case; that unless there is some information in that report, and that this defendant can testify that the hearing officer told him certain information that she thought was derogatory, and she did not include that in her report, that then this investigative report may become relevant. However, without that evidence there is no foundation to show that these

are relevant. I mean if we allow that, then we are going back behind what the administrative officer thought was derogatory.

The Court: The question here is: One, the request was made, was it not?

Mr. Real: That is correct, your Honor.

The Court: Two, the instructions of the Attorney General require that the request be complied with?

Mr. Real: That is correct, your Honor.

The Court: So, as part of the administrative due process as distinguished from constitutional or statutory due process, the question is: Did this defendant receive the derogatory or unfavorable information in response to his request?

The foundation for that would be: One, the request was made; two, was it complied with? That would be the issue, would it not?

Mr. Real: That is correct, your Honor.

The Court: Two would be: What did the hearing officer [43] tell you? Then, measured against what the hearing officer said would be what the hearing officer had in his or her possession, would it not? So the FBI report, once we knew what the hearing officer told the registrant, the unfavorable information, if any, in the possession of the hearing officer would become relevant, would it not?

Mr. Real: I don't think so, your Honor, in this: That we have to look at the function of the FBI report in the hands of the hearing officer, and that function, as distinguished from something else, some other information that is offered by the de-

fendant himself or offered by some outside source other than this investigative report, is part of her thought process. In other words, when she looks at this she thinks certain things are derogatory, because the regulations do not provide that all of it be given to the defendant.

The Court: Isn't it a portion of her thought process to guard against arbitrary action based upon concealed or undisclosed information? For instance, suppose a case where the hearing officer said the registrant wrote a request pursuant to this administrative process; the registrant said, "I want to know the unfavorable evidence against me." The hearing officer says, "There is none, there is none, so there is nothing for me to give you." And the hearing officer sends in an unfavorable recommendation, does not mention any unfavorable information, but we open the FBI report and we [44] see all manner of unfavorable information.

Wouldn't that FBI report be admissible to show —I mean as relevant to the issue, as to whether the administrative process here was arbitrary?

The Attorney General has said if the registrant makes a timely request, he is entitled to have information as to unfavorable information; he is entitled to be informed as to unfavorable information in the possession of the hearing officer and an opportunity to refute it. The registrant makes the request and in effect it is denied. Of course, if you have a denial, then a denial of the request, out of hand, that is one problem. But here there was no denial. In the case I supposed there was no denial;

there was a purported compliance. On the issue of whether or not there was compliance would not the information, in fact, in possession of the hearing officer be relevant?

Mr. Real: I would like to make some sort of distinction in that, your Honor, because I do not think it is properly admissible to a jury. In other words, as a question of evidence to a jury it would not be admissible on that point. I think it would be this: Under the Cox case it might be admissible for the determination of your Honor as to whether or not the action of the hearing officer was arbitrary and capricious in view of the information that is placed in the report. [45]

The Court: The hearing officer does not take action, that is, any definitive action.

Mr. Real: I realize that, your Honor.

The Court: The hearing officer does not make any classification. The hearing officer merely makes a recommendation. In my view, if the Attorney General did not chose to do so, he would not be required to submit the report of the Federal Bureau of Investigation to the hearing officer, or the hearing officer would not be required to disclose to the registrant unfavorable information received by the Department of Justice as a result of the inquiry which the statute directs the Department of Justice to make. But the Attorney General has seen fit to combine, in effect, the inquiry, or to connect the inquiry and the hearing and has set up the administrative machinery for informing the registrant.

Mr. Real: I think, by the same token, your

Honor, we have the situation that if Congress had so deemed it, it would not be necessary for them to set up an appeal in any of these cases, and the only action or the only stop-gap on an appeal on the arbitrariness and capriciousness of an appeal board is your Honor's decision that their action is not arbitrary and capricious—a review by a court and not by a jury.

The Court: But an appeal board decides things. A hearing officer does not decide anything. He just makes a recommendation to an official in the Department of Justice who, in turn, [46] makes a recommendation to the appeal board.

Mr. Real: If your Honor goes along that line, then there can be no denial of due process by arbitrary and capricious action of the hearing officer.

The Court: Except of such due process as the Attorney General himself has conceived and provided here.

Mr. Real: That is right, your Honor.

The Court: What I called "administrative process."

Mr. Real: We have that one department that is analogous, extremely analogous to the Cox case and the appeal board. In other words, as to the arbitrary and capricious action, I think, your Honor——

The Court: Is there any testimony here as to what the hearing officer told this registrant in the way of unfavorable information?

Mr. Real: I do not think there is, your Honor.

The Court: Well, the foundation is not laid.

Mr. Tietz: I want to put the defendant back on for two questions.

The Court: Is there anything unfavorable, in your view, in this FBI report?

Mr. Tietz: No, but there is one misstatement of fact that might have been used.

The Court: I will sustain the objection at this time to the offer of Exhibit B for identification into evidence. [47]

Would you like to recall the defendant?

Mr. Tietz: Yes, the defendant would like to take the stand again.

The Court: He may.

JAMES ROLLAND FRANCY

recalled.

Direct Examination

(Resumed)

By Mr. Tietz:

Q. Mr. Francy, you have looked at the FBI investigative report and I am going to place it before you again and ask you to look at page 4 of it that gives the information furnished by a Mr. Bishop. Does it contain any incorrect statement of fact? A. Yes, it——

Mr. Real: Your Honor, I will object to that question as irrelevant and immaterial.

The Court: Sustained.

Mr. Tietz: Your Honor, it is my thought that if any information before the hearing officer was incorrect, and if this witness will testify, as I believe the witness is prepared to testify, that that

(Testimony of James Rolland Francy.)

incorrect statement of fact was not disclosed to the registrant when he was at the hearing, he then did not have the opportunity to set the hearing officer straight on what might have been the determining bit of evidence.

The Court: Is it unfavorable in character? [48]

Mr. Tietz: Yes.

The Court: Intended to be?

Mr. Tietz: Well, I will give the nature of it in three words, three or four words. He was requested to resign and that, it seems to me, is something which is unfavorable when said to anyone.

The Court: When you went to the hearing, Mr. Francy, did the hearing officer give you any information which she stated she had in her possession and which she considered unfavorable to or which tended to defeat your claim as a conscientious objector?

The Witness: Not in those terms. She quoted from the report.

The Court: What portion? Did she quote from the report what she said she considered unfavorable evidence, or just quoted generally?

The Witness: Just quoted generally.

The Court: Have you examined Exhibit B for identification?

The Witness: I believe that is this report?

The Court: Yes.

The Witness: I have.

The Court: I will reverse my ruling on that. We have to get at it some way. I do not know any better

(Testimony of James Rolland Francy.)

way to get at it than you are proceeding there, Mr Tietz, and that is to ask him—if your purpose is to show that there was some [49] unfavorable evidence in the hands of the hearing officer which was not supplied this defendant pursuant to his request, I will allow the question.

The Witness: Yes, sir.

The Court: Do you find something in Exhibit I which you consider unfavorable which was not disclosed to you by the hearing officer?

The Witness: In my opinion it is, rather, I believe to be incorrect, and it was not disclosed.

Mr. Real: Your Honor, I move to strike——

The Court: Do you consider it unfavorable?

The Witness: Yes, it would tend to influence.

The Court: Pardon me?

Mr. Real: Your Honor, I will move to strike the former answer: "I think it is——"

The Court: "incorrect"?

Mr. Real: ——"incorrect."

The Witness: All right. It is incorrect.

Mr. Real: Well, even that, your Honor, on the ground the question of the correctness or incorrectness of this report is not in issue in this case. It is whether or not this evidence, as placed in the FBI report, was given to him by the hearing officer.

The Court: There would be two ways of getting at it. One it to ask this witness when he made a request for unfavorable [50] information.

Mr. Real: That is correct, your Honor.

(Testimony of James Rolland Francy.)

The Court: Two is to ask him everything told him by the hearing officer.

Mr. Real: That is correct.

The Court: And against that you measure what she has in her possession, don't you?

Mr. Real: Yes, sir.

The Court: I was just attempting to short cut and I think Mr. Tietz was, too.

Mr. Real: I am sorry, your Honor.

The Court: Instead of asking everything she told him, we have the benefit here now of the short cut through the disclosure of the FBI report; so we turn it around the other way and ask him if he looked through it and does he see anything there which he considers unfavorable and which she did not disclose to him.

Mr. Real: Yes, your Honor. But my objection is to the answer that this report here is untrue. I don't think that is in issue here.

The Court: No, it is not in issue. The objection will be sustained as to that answer and that answer will be stricken.

Mr. Francy, do you find anything in Exhibit B for identification which you consider to be unfavorable to you [51] and which was not disclosed to you by the hearing officer?

The Witness: I do.

The Court: Will you read what portion of Exhibit B for identification you so find?

The Witness: Under the caption "Clarence E. Bishop" it states: "He stated that the registrant

(Testimony of James Rolland Francy.)

had been asked to resign because on two or three occasions he had failed to follow orders concerning the manner in which his work should be handled."

The Court: Is that all of it which you consider unfavorable?

The Witness: Well, he goes on and explains his—yes, I would say that.

Q. (By Mr. Tietz): Was that disclosed to you by the hearing officer at the hearing?

A. No, it was not.

Q. Now I am going to ask you to look at Exhibit 1, page 12.

The Court: Do you wish to renew your offer at this time of Exhibit B for identification into evidence?

Mr. Tietz: Yes, sir. I think that would be the orderly way to get that.

The Court: Is there objection?

Mr. Real: No objection at this time, your Honor.

The Court: Exhibit B for identification received into [52] evidence.

The Clerk: Defendant's Exhibit B received into evidence.

Mr. Tietz: Will the clerk please place before the witness Exhibit 1 of the Government?

Q. Would the witness please turn to page 12 of Exhibit 1? Is that the minutes of actions of the Local Board? A. Yes, it is.

Q. Would you please look at the line that has been on the left "2-8-51"? There are two entries at

(Testimony of James Rolland Francy.)

different dates on that one line, that one space, rather. A. Yes.

Q. Did you at these two or more occasions when you went to the board to look over your file notice that something was not there at one time and was added at another time? A. I did.

Q. What was it?

A. The statement "Refused a IV-E classification."

Q. Why did you notice that or why do you remember it?

A. Well, my first glance at it made me believe that I had at no time refused to accept a IV-E classification, which I don't believe they meant it that way.

Mr. Tietz: You may cross examine.

Cross-Examination

By Mr. Real:

Q. You say your first impression was that you say you [53] thought they meant that you had refused a IV-E classification?

A. Well, that is what drew my notice.

Q. That is what drew your notice to it. That is the first time you looked at the file that drew notice to this one particular line?

A. No. That is the particular statement which drew my notice at my second complete examination of the file.

Q. Did you observe the line the first time you looked at the file?

(Testimony of James Rolland Francy.)

A. I did. I examined the minutes of actions very carefully.

Q. You can say at this time that you are positive that statement was not there at that time, is that correct? A. That I have quoted, yes.

Q. You are positive that that was not there?

A. I can, yes.

Q. The first time that you looked at the file, and you can say that you are positive that page 26 was not in the form that it is now? A. I can.

Q. At that time? A. I can.

Q. At your personal appearing on February the 8th of 1951, were you refused a IV-E classification?

A. The matter was not delved into. [54]

Q. They did not consider the IV-E classification? A. No.

Q. What was your personal appearance for?

A. That is what I thought it was for, but the board asked me why I was there. I said I was there to aid them in considering my claim. And they informed me that I was liable to prosecution if I didn't follow an order of the board. I said I was aware of that. And then, as I stated before, the member of the board said, "Well, in that case we are not a high enough board to consider your file."

Q. Did you tell them at that time that you wanted a IV-E classification?

A. Well, it was evident from my letter requesting an appeal of my claim of I-AO.

The Court: You do not know what action the

(Testimony of James Rolland Francy.)

board may have taken following your personal appearance, I take it?

The Witness: They said that I would receive an order to report for physical examination, is the only action.

Q. (By Mr. Real): Mr. Francy, I call your attention to page 27.

A. Yes.

Q. The second paragraph says: "This is to confirm the decision of your board that your complete file will be forwarded to the Appeal Board after you have taken the physical examination for the Armed Forces and found Acceptable for [55] service."

A. Yes.

Q. You received that subsequent to your personal appearance hearing? A. I did.

Q. Can you tell us from your own knowledge what the board meant when they said: "This it to confirm the decision of your board that your complete file will be forwarded to the Appeal Board"?

A. The contents of this folder we have here.

Q. The "decision"—I am referring to the word "decision."

A. Well, the "decision" seems to refer that they decided it is the complete file.

Q. Now, was there any talk of any "decision" at your personal appearance?

A. No, there was not, other than what I have stated.

The Court: The only "decision", as I understand it, that was given to you at the time of the

(Testimony of James Rolland Francy.)

hearing or following your personal appearance there before the Local Board was that that board could not do anything for you, in substance, or would send the matter up to the appeal board for review, is that it?

The Witness: Well, they didn't say where they would send it. They just stated they were not a high enough court to consider my file. [56]

The Court: Then following the personal appearance you received the letter of February 8th, which is set forth on page 27 of Exhibit 1, the Selective Service file?

The Witness: I did.

The Court: Anything further?

Mr. Real: Yes, one more question.

Q. Calling your attention to page 26, you testified that that was not the page that you saw when you looked at your file after you were ordered to report for induction? A. Yes.

Q. Did you see any page that referred to your personal appearance at that time? A. I did

Q. What did that page say in substance?

A. In substance it was quite similar to page 26 as it is here, with the exception that it was a bit more brief and the sheet was about half the size of the page 26 as it appears before me here.

Q. It was "quite similar." What do you mean by "quite similar"? What information did it have on it?

Official Reporter.

The Court: Let us not spend any more time on

(Testimony of James Rolland Francy.)
that unless you have some new point. You have been over it once, heven't you?

Hasn't that question been asked and you answered it before, Mr. Francy? [57]

The Witness: Yes.

Mr. Real: No further questions, your Honor.

The Court: Anything further?

Mr. Tietz: No redirect.

The Court: You may step down.

Mr. Tietz: And the defendant rests.

The Court: Any rebuttal?

Mr. Real: One moment, your Honor. I would like to call Major Keeley to the stand, please.

Plaintiff's Case in Rebuttal

ELIAS M. KEELEY

called as a witness by the plaintiff in rebuttal, being first sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Elias M. Keeley, K-e-e-l-e-y.

Direct Examination

By Mr. Real:

Q. Major Keeley, what is your occupation?

A. I am a Major in the United States Army, assigned to the Selective Service and have charge of the classification and all administrative matters of Selective Service in Southern California.

Q. And as part of your duties is it your duty to review the files of registrants of Selective Service Boards within your jurisdiction? [58]

(Testimony of Elias M. Keeley.)

A. It is.

Q. I call your attention to Government's Exhibit 1 in evidence and ask you whether you reviewed that file?

A. I have reviewed all except this new outpacket which I have not seen.

Mr. Tietz: Excuse me. I will object to the materiality of the line of questioning; whether the Major reviewed it or anyone else would have no bearing.

The Court: What is the purpose of it?

Mr. Real: Your Honor, I am going to show by this witness that when he reviewed the file prior to it going to the appeal board or at the appeal board that a page similar in size to this page 26 and containing the information contained on page 26 was in the file at that time.

Mr. Tietz: I will withdraw my objection.

Q. (By Mr. Real): Major Keeley, when did you make the review of that file?

A. About the middle of March, 1951.

Q. And that was a date prior to, or subsequent to the file going to the appeal board?

A. That was while the file was at the appeal board, before it was considered by the appeal board members.

Q. I call your attention specifically to page 26 of the file for the defendant and ask you if you have seen that page before? [59]

A. Well, I have seen a very similar page.

(Testimony of Elias M. Keeley.)

can't say that this is the identical page, no.

Q. Would you say that the page that you saw, that you say is similar, was the same size as that page? A. I believe it was; yes, sir.

Q. I will ask you to read that page and ask you if it contained that information?

A. Yes, this information was on a page, a piece of paper similar to this.

Q. And that page was subsequent to your review sent to the appeal board?

A. It was considered by the appeal board, forwarded to the U. S. Attorney and to the hearing officer, back to Washington, and when it came back from Washington, we again checked the file and it was in there when it returned from Washington. We keep track of every piece of paper before we send it to the U. S. Attorney for fear something might be lost.

Mr. Real: You may cross examine.

Cross-Examination

By Mr. Tietz:

Q. Major, do you have any way of identifying each sheet of paper by marking or otherwise before it goes to the appeal board? A. I do not. [60]

Q. Any way of identifying it after it comes back from the appeal board?

A. No, except that we have our list of what was there and we generally can remember these various cases, but no particular marks on it.

Q. When you say "remember" do you mean you

(Testimony of Elias M. Keeley.)

go by memory on how many sheets or what was in the file? A. No, we write those down.

Q. Do you paginate the sheets as any time before or after it goes to the appeal board?

A. In some cases some local boards do that, but we do not require it. We do, however, when it is sent for photostating.

Q. So that these small pencil numbers with the circle around that appear on this file and similar files are put on ordinarily when it is photostated?

A. That is correct.

Q. At state headquarters?

A. That is correct.

Q. Do you have any means of knowing whether or not this precise page 26 was the sheet purporting to be summary of this defendant's personal appearance that was in the file when it went to the appeal board?

A. I cannot say that this was the identical sheet, no, sir. [61]

Q. If another sheet had been made and had added a line or two or rephrased something in addition to adding a line, would you be able to remember that? A. Ordinarily I would not.

Q. Is there anything about this particular case or this particular sheet that will enable you to say whether or not this precise sheet was in the file when it went for the consideration of the appeal board?

A. Yes, because in this particular case I reviewed it extra special because the summary was

(Testimony of Elias M. Keeley.)

such a short summary, and when I inquired as to why it was such a short summary they said that is all that happened.

Q. Was that first line that says "Registrant requested IV-E classification instead of I-AO"—was that in the version that went to the appeal board?

A. I believe it was. I cannot say positively.

Q. Was the next line that says "Local Board refused reclassification," that phrase of the next line, was that in there?

A. Yes, that was there. I remember that.

Q. Are you familiar with what is called the out file in this case? A. No, I am not.

Q. Well, if I were to inform you that in November, November 12, 1952, Col. Hartwell commented on the fact that [62] the summary did not show and the file did not show that there had been a reclassification, reconsideration, would that help refresh your memory of the circumstances?

A. I remember it because I reported it, was when he happened to write that letter instead of myself.

Q. And that was in November of 1952, was it not?

A. That was the 5th time that I had reviewed this file just prior to forwarding it to Sacramento for being photostated.

Q. What is Col. Hartwell's position in the Selective Service setup?

A. Well, he is administrative officer, you might say. We have two separate branches down there. We

(Testimony of Elias M. Keeley.)

have the southern area headquarters, of which he is in charge, and we have the district headquarters, of which I am in charge. Our duties are entirely separate but they conflict. He is the deputy, assistant deputy director of Selective Service and, as director co-ordinator, I am assistant to the director, if you can figure that out.

Mr. Tietz: Thank you.

The Court: Anything further?

Mr. Real: Nothing further, your Honor.

The Court: You may step down, Major Keeley. Any further rebuttal?

Mr. Real: No further rebuttal, your Honor. [63]

The Court: Does the Government rest?

Mr. Real: The Government rests.

The Court: Does the defendant rest?

Mr. Tietz: The defendant rests, your Honor.

The Court: Does the defendant now renew his motion for judgment of acquittal?

Mr. Tietz: Yes, sir. The defendant renews all the points that were raised then, and I would like to add some others that have been developed by the defense testimony.

The first point we would like to raise now is that there is a fairly clear indication that this defendant was not reprocessed at the personal appearance hearing, in that there is more evidence before the court now than there was at the close of the Government's case. The crowding of two lines on the line of February 8, 1951, and the defendant's testimony, that that particular part was unrebutted that there

was an addition of that line, namely, "Refused a IV-E classification, along with the testimony that was in before of the summary and of the letter of Col. Hartwell, would go to indicate that they did not do as they should have done, reclassified him.

Then there is the additional point that at the personal appearance hearing he was given no opportunity to go into the discussion of the file.

Now, that is an additional point to what is the usual [64] point, that the registrant wanted to bring up new and further testimony or evidence.

(Argument omitted from transcript upon request of counsel.)

But now, there is still another point in connection with the personal appearance hearing, and that is, they must do their function. They seem to be under the impression that they are mere transmitters of the files to appeal boards. They disregard what is really a judicial function. It was up to them at his personal appearance in which he requested—now, of course, he, like many of these young fellows, threw them off in his letter. His letter says: I want a personal appearance hearing and appeal, and it ignored to some extent the personal appearance part and they considered he was really going to get an appeal. But their duty is to first go over the matter of this personal appearance to give him all the opportunity, within reasonable limits of time, to present his case, and then they can turn thumbs down. But they must consider it, and they did not

consider it, and that is what I say is the most important denial of due process.

Now, I wish to advance, although I am not prepared to argue it in any particular length, that when the hearing officer said he could not have the FBI report, that he was then deprived of a right which has not yet been recognized by the courts although it has been touched on, as the court commented [65] on Judge Wallace's opinion in the Bouziden case, a District Court case.

And that, of course, brings us to the next point. When at a hearing a witness is lulled into security, when he is given to understand that everything is all right—I will recommend that your claim be sustained—and then turns around in her actual report and says he has all the requirements, he is a good boy, he has religious training, belief, and all that, but I do not recommend that he have anything but a I-AO, that should not be sustained.

That was the first line in her "conclusion." That when she does that, she has not given him a fair hearing that she should have. This is somewhat of a new point.

(Argument omitted.)

Now, the next point is this: That the hearing officer used an illegal basis in her determination. That is a point that I will have to put a number of things together on to lay the foundation for my argument.

The only thing, going over the report that she made as to her factual findings, that could support

her claim would be the statement that he is not as active now in his religious work as he was before.

Well, I have argued that point, that he should have had a chance to explain that, if it was her position, as I think it was. [66]

But the point I want to make now is that that is an illegal basis.

(Argument omitted.)

The Court: There is not any question in my mind throughout this defendant's entire encounter with the Selective Service System, as disclosed by his file, that he was found at all stages and by all persons whom he encountered entirely honest. The net result of the finding is this as I see it: Yes, he has the conscientious objections which he is expected to have, but those beyond the conscientious objections which entitle him to I-AO category of classification are not based on religious training and belief, are not founded. The burden is upon him and he has not sustained the burden, therefore, he is classified I-AO.

I find no irregularities in the administrative procedure. For that reason the defendant must be found guilty as charged. It is so ordered.

I will continue the case until March 30th, at 10:00 o'clock in the morning for sentence.

Is there anything to be gained by ordering a presentence report of this defendant?

Mr. Tietz: I have my doubt. I can say for certainly in this case that they could not find anything

that would help the court, that the FBI did not find.

The Court: What is the view of the government?

Mr. Real: I do not think it will be necessary, your Honor.

The Court: Very well, the court will direct that no presentence investigation or report be made in this case. The case is continued until March 30th, at 10:00 o'clock for sentence and all further proceedings.

Is the defendant at liberty on bail?

Mr. Real: Yes, he is, your Honor.

The Court: The court will continue your bail pending sentence, Mr. Francy. You are instructed to return to this courtroom on March 30th next at 10:00 o'clock in the morning. Do you understand the date?

The Defendant: Thank you.

Mr. Real: Your Honor, if it please the court, may the Government at this time withdraw Government's Exhibit 1 to return to the clerk of the Local Board?

The Court: The original file is Government's Exhibit 1 in evidence and there is also——

Mr. Real: I do not think we have put the photostatic copy in evidence, your Honor.

The Court: There is also a photostatic copy which I have here which has been marked in evidence.

Mr. Tietz: We have no objection to the substitution, provided that the Government furnish the out file.

Mr. Real: A photostatic copy of the out file. We will do that, [68] your Honor.

The Court: The photostatic copies are furnished to conform the photostatic of Exhibit 1 to the original file which is Exhibit 1. Is it stipulated that upon that condition, that condition having been fulfilled, that the original file may be withdrawn and that the photostatic copy shall stand as Exhibit 1, the file, in evidence?

Mr. Tietz: We so stipulate.

The Court: So ordered.

Mr. Real: May we withdraw it to photostat that copy, your Honor?

The Court: Do you have the clerk photostat it or have you facilities?

Mr. Real: Yes, we will have them. And, for the record, we can stipulate that the out file is seven pages, if that will help.

The Court: The stipulation, Mr. Real, is that you shall conform a photostatic copy to the original which is in evidence, and when that has been done to the satisfaction of the clerk, the clerk will deliver you the original file and detain the photostatic copy of the file as Exhibit 1.

Is that your understanding, Mr. Tietz?

Mr. Tietz: Yes, or if Mr. Real may have carbon copies he wants to substitute, that will be all right.

The Court: I suggest as long as substantially all the [69] file has been photostated, that you be consistent and complete it in the photostatic form and deliver it to the clerk in that form so it may be retained as a complete photostatic copy of the Selective Service file.

Mr. Real: Your Honor, we cannot photostat without this particular part of the file which I am holding, which is the file referred to as the out file.

The Court: I understand. Did you not say the clerk was to do the photostating for you?

Mr. Real: The clerk here. We have been having the Selective Service System do our photostating, your Honor, in these cases.

The Court: Is there any objection to the withdrawal of the out file, so-called out file, from the original file, Exhibit 1, for that purpose?

Mr. Tietz: The defendant has no objection.

The Court: Very well, it is so ordered pursuant to stipulation. [70]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings, as specified by counsel for defendant, had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 9th day of July, 1953.

/s/ ALBERT H. BARGION,

[Endorsed]: Filed July 16, 1953.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 15, inclusive, contain the original Indictment; Waiver of Trial by Jury and of Special Findings of Fact; Judgment and Commitment; Notice of Appeal; Designation of Record on Appeal and two Orders Extending Time to Docket Appeal and a full, true and correct copy of Minutes of the Court for December 8, 1952, and March 18 and April 7, 1953, which, together with the original exhibits and reporter's transcript of proceedings on March 18, 1953, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 28th day of July, A.D. 1953.

[Seal] EDMUND L. SMITH,
Clerk,

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13940. United States Court of Appeals for the Ninth Circuit. James Rolland Francy, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed July 29, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit
No. 13940

JAMES ROLLAND FRANCY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENTS OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

I.

Classification of appellant in Class I-AO (making appellant liable for noncombatant military service) was arbitrary and without basis in fact.

II.

Appellant was denied due process of law in connection with his personal appearance hearing before the local board, on each of the following grounds:

First: appellant was deprived of the kind of personal appearance hearing contemplated and guaranteed by the regulations in that the board did not shoulder its responsibility to reclassify but deliberately shifted it to the appeal board and in that it did not give him the opportunity to discuss his file and his classification, as guaranteed by the regulations.

Second: the summary of the personal appearance hearing was not a true summary, as contemplated and as required by the regulations but was a mere Minute Order, and the evidence and testimony establishing that the summary of the personal appearance hearing may have been altered to conceal a violation of Sec. 1624.2(d) S.S. Regulations discloses sufficient irregularity to vitiate the entire proceedings.

Third: the regulations in effect at the time appellant had his personal appearance hearing before the local board mandatorily required that he be classified anew after said hearing and this was not done.

III.

The Hearing Officer deprived appellant of due process of law in the following particulars each vitiating the usefulness of his report and tainting the further classification action:

First: although appellant made a timely request to see the FBI investigation report she refused to show it to him.

Second: her report was arbitrary and prejudicial

in that it's adverse conclusion was inconsistent with its own findings of fact.

Third: she used an illegal basis for her adverse conclusion.

IV.

The regulations mandatorily required that appellant be sent a notice of the action taken by the local board as a result of his personal appearance hearing.

V.

The plaintiff did not show, beyond a reasonable doubt, that the Order to Report for Induction was validly executed.

VI.

The failure and refusal to provide appellant with the secret FBI report was a violation of the Act, the Regulations, and the due process clause of the Fifth Amendment.

/s/ J. B. TIETZ,
Attorney for Appellant.

[Endorsed]: Filed September 9, 1953.

[Title of Court of Appeals and Cause.]

ADOPTION OF DESIGNATION

Appellant hereby adopts the Designation of Record heretofore filed in the District Court.

/s/ J. B. TIETZ.

[Endorsed]: Filed September 9, 1953.

No. 13940

United States Court of Appeals

FOR THE NINTH CIRCUIT.

JAMES ROLLAND FRANCY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

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No. 13940

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES ROLLAND FRANCY,

Appellant,

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UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

JURISDICTION

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Southern District of California, Central Division. [4-6][1] The district court made no specific findings of fact. These

[1] **Numbers appearing in brackets herein refer to pages of the printed Transcript of Record filed herein.**

were waived. No reasons were stated by the court in writing for the judgment rendered. The judge for the court below briefly stated orally his reasons for the conviction. [66]

The trial court found appellant guilty. [66] Title 18, Section 3231, United States Code, confers jurisdiction in the district court over the prosecution of this case. The indictment charged an offense against the laws of the United States. [3-4] This Court has jurisdiction of this appeal under Rule 37 (a) (1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law. [6-7]

STATEMENT OF THE CASE

The indictment charged the appellant with a violation of the Universal Military Training and Service Act. It was alleged that after appellant registered and was classified, he was ordered to report for induction. It is then alleged that on or about July 10, 1952, appellant "knowingly failed and neglected to report for induction into the armed forces of the United States as so notified and ordered to do." [4]

Appellant pleaded not guilty. He waived the right of trial by jury. Findings of fact and conclusions of law were also waived. [9] Appellant subpoenaed the production of the secret investigative report of the FBI made pursuant to Section 6(j) of the act. The Government produced the report at the trial. The FBI report was admitted into evidence. [50-51] It was used at the trial. [51]

After receiving evidence and hearing testimony, the court considered a motion for a judgment of acquittal made by the appellant. [21-24, 63-65] The motion was denied. [66] The appellant was convicted. [66] He was sentenced to serve a period of four years in the custody of the Attorney General. [4-6] Notice of appeal was timely filed. [6-7] The transcript of the record (including the statement of points relied upon) has been timely filed in this Court.

THE FACTS

James Rolland Francy was born on November 5, 1931. (1)[2] He registered with his local board on May 8, 1950. (2) The local board mailed to him a selective service classification questionnaire on January 4, 1951. (3) Francy filled the form out in a proper manner and filed it with his local board. (5)

He showed his name and address. (6) He did not answer that he was a minister of religion. (7) He showed that he had no employment. (8-9) He showed that he was born in Glendale, California, on November 5, 1931. (10) He signed Series XIV showing that he was a conscientious objector. He requested that the conscientious objector form be mailed to him. (11)

The local board mailed the special form for conscientious objector to him. (12) He did not sign either signature lines under Series I(A) or Series I(B). He did, however, make his own separate statement. He said: "I am by reason of my religious training and belief, conscientiously opposed to participation to war in any form and I am further conscientiously opposed to participation in noncombatant training or service in the armed forces. I, therefore, claim exemption from combatant and noncombatant training and service in the armed forces." (13)

In the conscientious objector form Francy showed that he believed in the Supreme Being. He stated that the nature of his belief involved duties superior to any obligations arising from human relations. (14) He stated that he believed in obeying all the laws of the land not in conflict with the law of God. One law of God that he would not violate was the commandment: "Thou shalt not kill." (18) He stated that he followed the law of love rather than the law of killing. He said that he could not fight for any government.

[2] **Numbers appearing in parentheses refer to pages of the draft board file that are written in longhand at the bottom of each page and circled.**

He emphasized that he feared God and trusted in him. He stated that he respected the United States Government as the best government on earth, but because of his being a Christian he had to put God's kingdom first. (14, 18) He showed that the kingdom of God was not of this world, and that he could not support both this world and the government of God. He preferred to support God's kingdom. (19)

In answer to the question as to how he got his belief as a conscientious objector, he showed that he received it from training by his mother and his grandparents. He said that they were Bible students and that they reared him as one of Jehovah's Witnesses. He added that he relied on Mrs. Rose more than any other person for religious guidance. (15) Francy said that he believed in the use of force only when "dealing with individual criminals". (15)

In the conscientious objector form Francy reviewed at length the behavior in his life that demonstrated the consistency and depth of his conviction. First he began with his attendance at school as a little child. He showed that according to his conscientious beliefs he refused to salute the flag of any nation. He offered to stand with respect. He stated that the schoolteacher compelled him to leave the room while the ceremony was in progress. He reviewed the history of his trouble when, as a student in school, he refused to salute the flag. Then he showed in his statement that the teachers allowed him to stand at attention while other students saluted the flag. (20)

He explained at length the reasons why he could not salute the flag. He showed that he respected the flag and the nation for which it stood. However, because of his covenant with Almighty God he could not violate the commandment of God recorded at Exodus 20: 3-5. He showed that it was his conscientious belief that the salute of the flag violated that particular commandment of Almighty God. He then added that he was willing to pledge to the fact that he would be obedient "to all the laws of the United States that are consistent with God's law, as set forth in the Bible." (21)

He answered that he had given public expression to his conscientious objections. He stated that he wrote a paper in high school. In the paper he emphasized the fact that he did not put his trust in any government on earth but that he relied exclusively upon Almighty God for protection. He referred to the fact that he refused to buy defense stamps while attending school during the last war, when he was requested to purchase such stamps. He stated that he told many of his classmates and his friends about his beliefs and conscientious objections.

Francy gave a list of the schools he attended, a list of his employers and a list of his residences, or places where he had lived. (15-16) He named his parents. He showed that they were divorced. He said that he did not know the religion of his father. He showed that his mother's religion was that of Jehovah's Witnesses.

Francy told the draft board in this form that he was a member of a religious organization. He said that he was one of Jehovah's Witnesses. He described the Watchtower Bible and Tract Society of Brooklyn, New York, as being the legal governing body of the group. He pointed out that he had been reared as one of Jehovah's Witnesses. He showed the board that he had been baptized in 1939. He then gave the address of the church in Tujunga, California. He gave the name of Merle G. Carmichael as the presiding minister of the congregation. (16)

Francy described extensively his creed as one of Jehovah's Witnesses. He stated that he was in the army of Christ Jesus. He said that he was authorized to use only the weapons of a soldier of Christ Jesus. He showed that such weapons of warfare were not carnal. He answered that he was not authorized to engage in war or to use any of the implements of warfare used by the nations of this world. He showed that, as a Christian soldier or minister, he could not desert the army of Christ Jesus for any army in the world. He referred back to the description of his belief in Series II

of the special form for conscientious objector, Question 2. (14, 18-21)

Francy listed several persons as references. He signed the conscientious objector form. (17)

The local board gave Francy a classification that made him liable for the performance of noncombatant military service as a conscientious objector in the armed forces. The classification was I-A-O. (12) After notification of this classification, Francy wrote a letter to his local board taking an appeal and requesting a personal appearance. (24) He was notified to appear before the local board, which he did. (12, 25) Upon his personal appearance he requested the local board to give him the full conscientious objector classification, which was then IV-E. This was in lieu of the I-A-O classification. The local board even refused to reclassify him. The local board merely said that his file would be forwarded to the appeal board. In fact, he was warned that he must comply with all of the Selective Service Regulations. (26)

The local board thereafter wrote Francy for the name of his present employer. In this letter the clerk of the local board confirmed the decision of the local board that his file would be sent to the appeal board after his armed forces physical examination. (27) Francy notified the board that he was unemployed. (28)

Francy was given a preinduction physical examination and found to be acceptable. (29, 30-38, 39) The local board sent the file to the board of appeal. (12) The appeal board determined that Francy was not to be classified as a conscientious objector and thus caused the file to be referred to the Department of Justice. This reference was for an appropriate inquiry and hearing. (12, 40)

The file was received by the Department of Justice. (44) The case was investigated by the FBI and a secret report made. After the case was with the department for ten months it was finally completed. (44) The hearing officer received the complete file and the secret investigative re-

port from the department on January 4, 1952. (44) He notified Francy to appear before him on January 18, 1952, for a hearing on his conscientious objections. (44) Francy wrote to the hearing officer and requested notice of the unfavorable evidence before the hearing, which was in accordance with the notice received from the hearing officer. [30] The hearing officer wrote Francy a letter and said that she would give the adverse evidence to him before the hearing proceeded. She promised this on the day of the hearing. [31] At the hearing the hearing officer quoted to Francy from the secret report. [32] The hearing officer gave some of the unfavorable evidence but not all appearing in the report. [42]

An extensive FBI report was made on Francy. After it was completed, it was forwarded to the Department of Justice by the FBI. It was then, in turn, sent to the hearing officer. The hearing officer had possession of the FBI report. She had it before the hearing and used it in making her report on the registrant's conscientious objections, which report was made to the Department of Justice. The hearing officer on January 28, 1952, made a report to the Department of Justice. The report first gave the background of Francy. It stated that he expected to attend the University of California at Berkeley, and that he intended to study to become an engineer. The hearing officer stated that Francy was baptized as one of Jehovah's Witnesses in 1939. She said that he had been active in the preaching work of Jehovah's Witnesses during his teens and that he was a devout Jehovah's Witness. She said that as such he was a conscientious objector to military service of any kind. She pointed out that he was a top-grade student in school. She showed that he lived with his mother and stepfather.

The hearing officer made reference to the FBI report. She said that the report showed that he was reared as one of Jehovah's Witnesses and that he was sincere as a conscientious objector. She said that the report showed that he based his objections on religious belief. The report

showed that he had been one of Jehovah's Witnesses since childhood. The report of the FBI was referred to as showing that he was "not presently active in this church." Here the hearing officer stated that the FBI quoted from the congregation servant, who was reported to have stated that Francy occasionally attended services but that he devoted none of his time to the work. The FBI report was referred to to show that the presiding minister said that Francy did not have any lack of faith but that he had done, of course, little work, due, perhaps, to the uncertainty of his Selective Service status.

The hearing officer concluded that Francy was sincere in his conscientious objections and that his beliefs came from religious training and beliefs. She emphasized that they were not recent. She did, however, recommend that Francy should be placed in Class I-A-O. This classification denied him his full conscientious objector status. It permitted him to make a partial claim as a conscientious objector. He was made liable for military training and service in the armed forces as a noncombatant soldier with conscientious objections only to combatant training and service. (45-46)

The Department of Justice concurred in the recommendation of the hearing officer. The Special Assistant to the Attorney General in turn wrote a letter to the district board of appeal. In his letter he recommended that the report and recommendation of the hearing officer be followed and that Francy be classified in Class I-A-O, making him liable for noncombatant military service. (41, 42)

The appeal board, upon receipt of the Selective Service file and the papers from the Department of Justice, did as was recommended. It classified Francy in Class I-A-O. This made him liable for the performance of noncombatant military service. (41) When the local board received the file back from the appeal board, it notified the appellant of his classification. (12)

Francy, between the time of his local board classification and the classification by the board of appeal, went to work

for the Lite Steel Corporation. That employer wrote a letter concerning Francy to the local board on May 22, 1952 (filed on May 23, 1952). The local board considered the letter and determined that it was insufficient to authorize a deferment. (12, 52)

On the 20th of June, 1952, Francy was ordered to report for induction on July 10, 1952. He acknowledged receipt of the notice. He went to the local board and told the clerk of the board that he could not comply with the order to report for induction. On July 10, 1952, he failed to report for induction as ordered by his local board. (12, 53, 56)

QUESTIONS PRESENTED AND HOW RAISED

I.

The undisputed evidence showed that appellant possessed conscientious objections to participation in both combatant and noncombatant military service. He showed that these objections were based upon his sincere belief in the Supreme Being. He established that his obligations to the Supreme Being were superior to those owed to the state. He showed that his beliefs were not the result of political, sociological or philosophical views, but were based solely on the Word of God. (12-22) The local board classified Francy in Class I-A-O. This classification made him liable for service in the armed forces as a conscientious objector to combatant military training and service. (12) The local board forwarded the file to district appeal board. The file was referred to the Department of Justice. After a hearing on the conscientious objections of the appellant the hearing officer recommended the I-A-O classification. The Department of Justice concurred in this recommendation by the hearing officer and recommended to the appeal board that Francy be classified I-A-O. (42) The appeal board classified Francy in Class I-A-O, making him liable for noncombatant military service. (41)

It was contended in the motion for judgment of acquittal

that the denial of the conscientious objector status was arbitrary and capricious. [23-24, 64-65] The motion for judgment of acquittal was denied. [66]

The question presented here, therefore, is whether the denial of the claim for classification as a conscientious objector was without basis in fact and whether the recommendation of the Department of Justice and of the hearing officer, as well as the classification by the district appeal board, were without basis in fact, arbitrary and capricious.

II.

The local board classified Francy in Class I-A-O on January 25, 1951. (12) He requested a personal appearance. (24) He was notified to appear on February 8, 1951. (25) Upon the personal appearance no new classification was given. The old classification was not set aside. The local board did not consider the case *de novo*. It regarded the case as closed, as far as the local board was concerned. It notified the registrant that his case would be sent to the appeal board for its determination. (26, 27)

The motion for judgment of acquittal complained of the fact that the local board did not give Francy a *de novo* consideration upon his personal appearance and that it refused to reclassify him anew upon the hearing. [23, 64] The motion for judgment of acquittal was denied. [66] The trial court held that the draft board officials were entirely honest. [66]

The question presented here, therefore, is whether there was a denial of due process of law, contrary to the Selective Service Regulations, upon the personal appearance when the local board failed and refused to reconsider the claim of Francy *de novo* and also to reclassify him entirely anew following his personal appearance.

III.

The secret FBI investigative report was in the hands of the hearing officer at the time of the hearing. [39-40]

Francy made a request to be given a summary of the FBI report before the hearing. [30-33]

During the personal appearance of appellant before the hearing officer she read excerpts to Francy from the FBI report that were considered by her to be adverse and unfavorable. [31-32] Francy had no way to test whether what the hearing officer read to him was a fair and adequate summary. [33-34]

Complaint was made in the motion for judgment of acquittal that the failure to give all the adverse evidence to appellant that appeared in the FBI report denied appellant due process of law. [65]

The question presented, therefore, is whether appellant was denied a full and fair hearing upon the hearing before the hearing officer by not being given a full and adequate summary of the FBI report.

SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motion for judgment of acquittal, duly made at the close of all the evidence.

II.

The district court erred in convicting the appellant and in entering a judgment of guilt against him.

III.

The district court committed reversible error in refusing to hold that there was no basis in fact for the denial of the conscientious objector status, that the clasisfication was arbitrary and capricious and that appellant was denied his procedural rights to due process of law.

SUMMARY OF ARGUMENT

POINT ONE

The board of appeal had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant, and it arbitrarily and capriciously classified him in Class I-A-O.

Section 6(j) of the act (50 U. S. C. App § 456(j), 65 Stat. 83) provides for the classification of conscientious objectors. It excuses persons who, by reason of religious training and belief, are conscientiously opposed to participation in war in any form.

To be entitled to the exemption a person must show that his belief in the Supreme Being puts duties upon him higher than those owed to the state. The statute specifically says that religious training and belief does not include political, sociological or philosophical views or a merely personal moral code.

Section 1622.14 of the Selective Service Regulations (32 C. F. R. § 1622.14) provides for the classification of conscientious objectors in Class I-O. This classification carries with it the obligation to do civilian work contributing to the maintenance of the national health, safety, or interest.

The undisputed evidence showed that the appellant had sincere and deep-seated conscientious objections to participation in war. These objections were to both combatant and noncombatant military service. These were based on his belief in the Supreme Being. His belief charged him with obligations to Almighty God superior to those of the state. The evidence showed that his beliefs were not the result of political, sociological, or philosophical views. He specifically said they were not the result of a personal moral code. The file shows without dispute that the conscientious objections were based upon his religious training and belief as one of Jehovah's Witnesses. The board of appeal, not-

withstanding the undisputed evidence, held that appellant was not entitled to the conscientious objector status.

The denial of the conscientious objector classification is arbitrary, capricious and without basis in fact.—*United States* v. *Alvies,* 112 F. Supp. 618; *Annett* v. *United States,* 205 F. 2d 689 (10th Cir.); *United States* v. *Graham,* 109 F. Supp. 377 (W. D. Ky.); *United States* v. *Pekarski,* — F. 2d — (2d Cir. Oct. 23, 1953); *Taffs* v. *United States,* — F. 2d. — (8th Cir. Dec. 7, 1953).

POINT TWO

The local board denied appellant procedural due process upon his personal appearance when it failed to consider his case *de novo* and to give him a new classification following the personal appearance as required by Section 1624.2 of the regulations.

Section 1624 of the Selective Service Regulations required a completely *de novo* consideration of the claims of appellant upon his personal appearance. The evidence shows that the board did not do this. It was their intention to send the case to the appeal board for determination. This conclusion was reached before or upon the personal appearance. The regulations were defied by the local board.

The decision of the courts is that failure to conduct a *de novo* hearing upon personal appearance is basis for acquittal. This Court has so held in *Knox* v. *United States,* 200 F. 2d 398.

The trial court should have sustained the motion for judgment of acquittal because there was a denial of due process upon the personal appearance. This was because of the failure of the local board to consider the case of appellant entirely anew upon personal appearance.

POINT THREE

Appellant was denied a full and fair hearing upon his personal appearance before the hearing officer in the Department of Justice when that officer failed and refused to give to appellant a full and fair summary of the secret FBI investigative report on the *bona fides* of appellant's conscientious objector claim.

Section 6(j) of the act (50 U. S. C. App. § 456(j) 65 Stat. 83) provides for the hearing in the Department of Justice. *United States* v. *Nugent,* 346 U. S. 1, specifically held that, while the registrant was not entitled to be given the secret FBI investigative report, it was the duty of the Department of Justice to supply to the registrant a full and fair résumé of the secret report. This was not done by the hearing officer at the hearing in the Department of Justice.

Francy had written to the hearing officer before the hearing and requested the adverse information in the FBI report. Francy did not ask for the summary of the FBI report at the hearing, since it was unnecessary for him to do so. The Department of Justice has amended its regulations and now requires that a full and complete summary of the entire FBI report be given to the registrant at the hearing, regardless of whether he requests it or not. This amendment of the regulations of the department and the change in practice is a confession of the department that before the *Nugent* decision it was unnecessary for the registrant to request a summary.

Even if the Court should conclude that it is necessary for a registrant to request a summary of the FBI report at the hearing, appellant is nevertheless in position to claim that in this case it be produced. Nevertheless, in this case the appellant is in position to complain of the failure to make a full and fair résumé of the FBI report.

The hearing officer gave appellant two or three small bits of evidence. Her making a partial summary waived the requirement that Francy request the adverse evidence. Since

she undertook to make a summary of the FBI report it was her responsibility to make a full report.

POINT FOUR

The nature of the defenses shows that the appellant was denied procedural due process and that the draft board exceeded its jurisdiction. This makes inapplicable the rule of *Falbo* v. *United States,* 320 U. S. 549, cutting off defenses of illegal classification because of failure to exhaust remedies.

That Francy did not report for induction does not make the doctrine of *Falbo* v. *United States,* 320 U. S. 549, applicable. The holding in that case is confined to challenges to the classification. The decision does not reach defenses based on the violation of the act and regulations that deprive the registrant of procedural due process of law.

When defenses are raised (as here) that there is a violation of the procedural rights of the registrant, the courts have uniformly held that the doctrine of *Falbo* v. *United States,* 320 U. S. 549, does not apply. The illegal reopening of a classification in violation of the regulations, the denial of rights on personal appearance or the refusal of rights of appeal are all defenses that can be raised in response to an indictment charging (as here) a failure to report for induction. *United States* v. *Peterson,* 53 F. Supp. 760 (N. D. Cal. S. D.); *United States* v. *Laier,* 52 F. Supp. 392 (N. D. Cal. S. D.); *Tung* v. *United States,* 142 F. 2d 919, 921-922 (1st Cir.); *United States* v. *Ryals,* 56 F. Supp. 773, 775 (N. D. Ga. N. D.); *United States* v. *Walden,* 56 F. Supp. 777-778 (N. D. Ga. N. D.). Compare *Baxley* v. *United States,* 134 F. 2d 610, and *Wells* v. *United States,* 158 F. 2d 932, 933 (5th Cir.), the latter being directly in point on the right to consider the procedural questions raised in this case.

Appellant contends that the failure to give a full and fair summary of the FBI report to him by the hearing officer is a procedural due process violation. He also says that

the refusal of the local board to consider his claim for classification entirely anew upon personal appearance was a violation of procedural due process.

The first point presented above also should be considered by this Court. The case was tried in the district court on the proper theory that under present law the appellant had a right to make a challenge to the classification in defense to the indictment. See *Dodez* v. *United States,* 329 U. S. 338. Also the Government, by failing to object to the making of the defense, waived its right to insist that no defense can be made. Now appellant had exhausted his remedies when he had the final type preinduction physical examination. (*Dodez* v. *United States,* 329 U. S. 338) The present act, unlike the 1940 act, does not contemplate cutting off defenses in response to indictments charging a failure to report for induction, even where there is no preinduction physical examination. See Ex parte *Fabiani,* 105 F. Supp. 139 (E. D. Pa.).

Therefore this Court can consider each and all of the points above raised in response to the indictment.

ARGUMENT

POINT ONE

The board of appeal had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant, and it arbitrarily and capriciously classified him in Class I-A-O.

Section 6(j) of Title I of the Universal Military Training and Service Act of 1951 (50 U. S. C. § 456(j)), provides, in part, as follows:

> "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal code."

Section 1622.14 (a) of the Selective Service Regulations (32 C. F. R. § 1622.14 (a)) provides:

> "In Class I-O shall be placed every registrant who would have been Classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces."

The documentary evidence submitted by the appellant establishes that he had sincere and deep-seated conscientious objections against combatant and noncombatant military service which were based on his "relation to a Supreme Being involving duties superior to those arising from any human relation." This material also showed that his belief was not based on "political, sociological, or philosophical views or a merely personal code," but that it was based upon his religious training and belief as one of Jehovah's Witnesses, being deep-seated enough to drive him to enter into a covenant with Jehovah and dedicate his life to the ministry.

There is not one iota of documentary evidence that in any way disputes the appellant's proof submitted showing that he was a conscientious objector. The statement of facts made by the hearing officer of the Department of Justice and the summary of the FBI investigative report do not contradict but altogether corroborate the statements made by the appellant in his conscientious objector form.

The Department of Justice makes an extensive ex parte investigation of the claims for classification as a conscientious objector when first denied by the appeal board, pursuant to 50 U. S. C. App. § 456(j). If there were any adverse evidence, certainly agents of the FBI in their deep and scrutinous investigation would have turned it up

and produced it to the hearing officer to be used against the appellant. The summary supported the appellant's claim.

There is no question whatever on the veracity of the appellant. The Department of Justice and the hearing officer accepted his testimony. The appeal board did not raise any question as to his veracity. It merely misinterpreted the evidence. The question is not one of fact, but is one of law. The law and the facts irrefutably establish that appellant is a conscientious objector opposed to combatant and noncombatant service.

In view of the fact that there is no contradictory evidence in the file disputing appellant's statements as to his conscientious objections and there is no question of veracity presented, the problem to be determined here by this Court is one of law rather than one of fact. The question to be determined is: Was the holding by the appeal board (that the undisputed evidence did not prove appellant was a conscientious objector opposed to both combatant and noncombatant service) arbitrary, capricious and without basis in fact?

A decision directly in point supporting the proposition made in this case, that the I-A-O classification (conscientious objector willing to perform noncombatant military service) and the determination of the appeal board denying the I-O classification (full conscientious objector) are arbitrary and capricious is *United States* v. *Relyea,* No. 20543, United States District Court for the Northern District of Ohio, Eastern Division, decided May 18, 1952. In that case the district court sustained the motion for judgment of acquittal saying, among other things, as follows:

> "I think it would have been more difficult for the court to find the act of the Board was without any basis in fact if the Board had classified this man as I-A rather than I-A-O. They accepted the defendant's profession of sincere and conscientious objections on the religious grounds as being truthful, but they attempted, and in my opinion

> without any basis in fact, to assert that while he was sincere and conscientious, that sincerity and conscientiousness extended only to his active aggressive participation in military service and that he was not sincere in his statements that he was opposed to war in all its forms."

This was an oral opinion which is unreported. A printed copy of the stenographer's transcript of the decision rendered by Judge McNamee will be handed up at the oral argument.

A similar holding was made by United States District Judge Murray in *United States* v. *Goddard,* No. 3616, District of Montana, Butte Division, June 26, 1952. The court, among other things, said:

> " . . . after due consideration, the Court finds that the evidence is insufficient to sustain a conviction for the reason that there is no basis in fact disclosed by the Selective Service file of defendant upon which Local Board No. 1 of Ravalli County, Montana, could have classified said defendant in Class I-A-O, and therefore the said Board was without jurisdiction to make such classification of defendant and to order defendant to report for induction under such classification."

The above decision was a part of a judgment. No opinion was written. A printed copy of the judgment accompanies this brief.

This case is distinguished from the facts in *Head* v. *United States,* 199 F. 2d 337 (10th Cir.), where the I-A-O classification was held to be proper. In that case the facts showed that the registrant was a member of a church that believed it was right to perform noncombatant military service and that the I-A-O classification was satisfactory. Also facts were present in the *Head* case that impeached the good faith conscientious objections of the registrant. Here the undisputed evidence showed that the religious

group that Francy belonged to were opposed to both combatant and noncombatant military service and that the I-A-O classification was not satisfactory. Francy was not impeached in his good faith.

There is absolutely no evidence whatever in the draft board file that appellant was willing to do noncombatant military service. All of his papers and every document supplied by him staunchly presented the contention that he was conscientiously opposed to participation in both combatant and noncombatant military service. The appeal board, without any justification whatever, held that he was a conscientious objector who was willing to perform noncombatant military service. Never, at any time, did the appellant suggest or even imply that he was willing to do noncombatant military service. He, at all times, contended that he was unwilling to go into the armed forces and do anything as a part of the military machinery.

The appeal board makes no explanation whatever of its reasons for rejecting the claim that appellant be placed in Class I-O as a conscientious objector to participation in both combatant and noncombatant military service. Certainly if there were anything in the file to indicate that appellant was willing to do noncombatant military service, the hearing officer and the Department of Justice would have found it and relied upon it.

The appeal board, without any grounds whatever, compromised appellant's claim for total conscientious objection and awarded him only partial conscientious objector status. This was directly contradictory to the testimony that appellant had given to the local board after the case was returned to the local board by the appeal board for further investigation. Appellant explicitly stated in his papers, as well as upon the special examination by the local board for the appeal board, that he would not even perform civilian work and that he objected to going into the army. He even stated that he would not serve as a chaplain in the armed forces.

It was arbitrary for the appeal board to grant only part of appellant's claim and his testimony and reject the balance. The board of appeal classified appellant as one who was willing to serve in the armed forces and perform noncombatant service. This finding flies directly in the teeth of the evidence and the sworn written statements submitted by the appellant.

The appeal board should have accepted the appellant's claim for exemption as a total conscientious objector or rejected completely his claim to be a conscientious objector. The appeal board had no authority to compromise his claim. Either he was telling the truth and was entitled to a I-O classification or else he was telling a lie and deserved a I-A classification. If the appeal board demurred to his evidence and the report of the hearing officer, it accepted the facts and made a determination that was without any basis in fact, arbitrary and capricious.

In this case the undisputed file showed that the appellant believed in the Supreme Being, that his religious duties were higher than those owed to the state, that he opposed participation in war because of them and that they were not the result of political, sociological or philosophical training but were religious beliefs. This brought the appellant clearly within the definition of a conscientious objector appearing in the act and the regulations.

There are many other grounds why the denial of the conscientious objector status is arbitrary, capricious and without basis in fact. These are argued extensively under Question One in the brief for appellant filed in *White* v. *United States,* No. 13,893, the companion case to this one, at pages 10-11, 14-33. Reference is here made to that argument as though copied at length herein. It is proper to make this reference because the two cases are heard here consecutively. They were tried by the same judge. They were tried consecutively. They appealed together. It is proper, therefore, to consider here the argument made in that case since the facts are identical to the facts in this case.

The position of the appellant on this point is eloquently argued by the opinion in *United States* v. *Alvies,* 112 F. Supp. 618 (N. D. Cal. May 28, 1953). Reference is made to the entire opinion. See also *United States* v. *Pekarski,* — F. 2d — (2d Cir. October 23, 1953); *Annett* v. *United States,* 205 F. 2d 689 (10th Cir.); *United States* v. *Graham,* 109 F. Supp. 377 (W. D. Ky.); *United States* v. *Konides,* Criminal No. 6216, United States District Court, District of New Hampshire, March 12, 1952; *United States* v. *Konides,* Criminal No. 6264, United States District Court, District of New Hampshire, June 23, 1953, Honorable Peter Woodbury, Circuit Judge, sitting as district judge by special designation. Copies of these unreported decisions accompany this brief. — See also *Taffs* v. *United States,* — F. 2d — (8th Cir. Dec. 7, 1953).

It is respectfully submitted that the denial of the conscientious objector claim is without basis in fact, arbitrary and capricious.

POINT TWO

The local board denied appellant procedural due process upon his personal appearance when it failed to consider his case *de novo* and to give him a new classification following the personal appearance as required by Section 1624.2 of the regulations.

The local board is charged with knowledge of the regulations regarding personal appearance including sections 1624.1(a), 1624.2 and 1624.3. Ignorance of the requirements of the regulations is no excuse. The requirements of the above regulations are mandatory. The purpose of the personal appearance before the local board is to protect the registrant's rights. The procedure to be followed by the local board upon a personal appearance is mandatory. The violation of the procedural requirements vitiates the classification and makes void the order to report for induction regardless of the subsequent classification by the appeal

board. Part 1624 of the regulations, providing for the personal appearance and procedure to be followed by the local board after personal appearances, must be complied with in order to guarantee the rights of the registrant.

The right to a *de novo* consideration of the classification is an important one. The appellant was entitled to be heard entirely anew as though he had never before been classified. The *de novo* consideration of the case by the local board upon personal appearance is essential to insure justice and due process of law.

The promulgators of the regulations fixing the procedure to be followed by the local board after a personal appearance intended that the rights of the registrant before the appeal board as well as before the local board be preserved. Those duties of the local board do not hinge upon whether "new information" was received by the local board.—*United States* v. *Zieber,* 161 F. 2d 90 (3rd Cir. 1947); *United States* v. *Stiles,* 169 F. 2d 455 (3rd Cir. 1948); *Knox* v. *United States,* 200 F. 2d 398 (9th Cir. 1952).

It may be argued by the Government that because no oral or written notice of classification was given in the *Stiles* (169 F. 2d 455 (3rd Cir. 1948)) and *Knox* (200 F. 2d 398 (9th Cir. 1952)) cases the situation is distinguishable. The fact that actual notice of no change of classification was given to Francy by letter does not in any way make harmless the failure to give the appellant a *de novo* hearing and a new classification upon personal appearance.

The facts in this case are identical to the facts in *United States* v. *Graham,* 108 F. Supp. 794 (N. D. N. Y. 1952). Judge Brennan there stated, among other things:

> " . . . Regulation 1624.2, subdivision (b), provides that the registrant may discuss his classification, may present further information, and may direct attention to information in his file which he believes the local board has overlooked. Subdivisions (c) and (d) define the duties of the Board after the registrant has appeared before it, and

by their terms require that the local board '—shall again classify the registrant in the same manner as if he had never before been classified', and shall thereafter mail to the registrant a notice of such classification.

" . . . An examination of the file in each case indicates a notation dated '2/28/51' on the back of each questionnaire to the effect that there was no change in classification. On the inside of the outside cover of each file there is the notation '2/28/51 appd. Before bd. No change in classification.' . . .

" . . . A memo dated February 28, 1951, signed by the acting chairman of the Board, is found in each file and is quoted in part below: 'Registrant presented no new evidence at this hearing and was advised by the board that his classification would remain Class I-A in accordance with the unanimous vote of all board members present.' . . .

"An appealing argument is made that the continuation of each defendant in the classification given them prior to February 28, 1951, did not affect his fundamental rights and did not violate the spirit of the Selective Service Regulations. It is urged that this is especially true, since each registrant was afforded the right to appeal and had full opportunity to present additional evidence, and that there is no showing that defendants have been either collectively or separately prejudiced.

"Judicial precedent, however, seems to indicate otherwise. As early as 1943, in the case of *United States* v. *Laier,* 52 F. Supp. 392, it was held that the denial of a personal hearing provided for by the Regulations was a denial of due process, and, since the presentation of additional evidence is but one of the rights afforded on such

hearing, the argument was rejected that subsequent appeals cure such an error. (See *United States* v. *Romano,* 103 F. Supp. 597.) A personal appearance before the Board and a hearing wherein the position is taken by the Board that the classification could not be reconsidered is, in effect, no hearing at all. It is at least a hearing without hope or relief. The absence of additional evidence or new information did not relieve the Board from the requirement that each registrant be classified anew. (*United States* v. *Stiles,* 169 F. 2d 455) . . .

"In the recent case of Ex parte *Fabiani,* 105 F. Supp. 139, there is discussed the increasing willingness of courts to scrutinize the action of local boards, and the cases cited above, together with *United States* v. *Strebel,* 103 F. Supp. 628, are indicative of the fact that the regulations must be strictly construed in favor of the registrant.

"It is conceded that the board did not mail to any of the defendants the notice of classification, as provided in Regulation 1624.2(d). This omission in itself, however, does not destroy the validity of the order of induction. (*Martin* v. *United States, supra* [190 F. 2d 755]); it being conceded that each defendant had actual notice on February 28, 1951, that his classification was unchanged.

"A full and fair disposition of the defendants' contention at every level of the Selective Service System is the measure of their rights. (*United States* v. *Romano, supra*) Unsubstantial deviations from procedural methods, as found in *Martin* v. *United States, supra,* and *United States* v. *Fry,* District Court for the Southern District of New York, March 6, 1952, [103 F. Supp. 905] do not void the order of induction. The right of each registrant to a new classification after a personal

> hearing is, however, a substantial right which the board is bound to afford him at that particular level of the Selective Service System."

The facts in this case cannot be distinguished from the facts in *United States* v. *Graham,* 108 F. Supp. 794 (N. D. N. Y. 1952).

This Court should apply here the rule of *United States* v. *Stiles,* 169 F. 2d 455 (3rd Cir.). In that case the appellant, one of Jehovah's Witnesses, was treated in the same way as was the appellant here. The facts are the same in every respect with the facts in this case. The Court said:

> "We think that the purpose of the regulation in this regard is to require the local board to consider anew each registrant's classification who appears personally before it and to notify him of its action upon its classification so that he may know definitely the result of his discussion with the board, which, of course, could result in a change of his classification even though he may have furnished no new information to the board. Moreover, § 625.2(e) gives such a registrant the same right of appeal from such new classification as in the case of an original classification."

The attention of the Court is called to the fact that the regulations are identical under the 1940 Act and the 1948 Act. Section 1624.3 postpones induction under the 1948 Act as did Section 625.3 under the 1940 Act. Until there is a mailing of a new notice of classification following the personal appearance the regulations specifically postpone induction until that act is performed. Since that was not done, there is no jurisdiction to issue the order to report regardless of actual notice on the part of the registrant of a violation of the regulations. Actual notice by the district judge and the Judges of this Court of an oral notice of appeal in no way would confer jurisdiction where there had been no written notice of appeal filed within the time and manner

required by the law in a case taken from the district court to this Court.

Martin v. *United States,* 190 F. 2d 775 (4th Cir. 1951), is not controlling here. In that case there was a *de novo* consideration. There was a new classification made. The only default by the local board was its failure to mail a classification card following the *de novo* classification. The court held that to be harmless error in view of the fact that Martin had received actual notice of the classification upon the occasion of his personal appearance and also because the clerk of the board read to him a written memorandum of the classification when he came to the local board following the classification made after personal appearance. The *Martin* case is not in point; *Stiles, supra,* is directly in point.

Atkins v. *United States,* 204 F. 2d 269 (10th Cir. 1953), does not apply. The distinction between the *Atkins* case and the case at bar is that in the *Atkins* case there was an actual reopening of the classification upon the personal appearance. In this case there was not any reopening. In the *Atkins* case the clerk testified that there was a reopening. The memorandum made upon the occasion of the personal appearance also showed that there was a *de novo* consideration.

In the case at bar the memorandum as well as the testimony shows conclusively that there was no *de novo* consideration of the claim for classification when the local board conducted the personal appearance. The memorandum to the contrary shows definitely that the case was not reopened. It is plain, therefore, that there was no *de novo* consideration of the claim for classification upon the occasion of the personal appearance as required by Section 1624.2(c) of the regulations.

Even appellant's appeal still does not cure the error. The complaint here made is that the local board did not reclassify the registrant upon the personal appearance. There was no *de novo* consideration of the case and no new classification as required by the regulations. The improper conduct of the local board upon personal appearance cannot be

corrected by a new classification on appeal.—*United States* v. *Laier,* 52 F. Supp. 392 (N. D. Cal. S. D. 1943); *United States* v. *Zieber,* 161 F. 2d 90 (3rd Cir. 1947).

The most important board to the registrant is his local board. The men that make up such a board can be seen. They can observe the registrant. They can see the sincerity of the registrant. They perform to the registrant the same function as the trial judge performs to the litigant. The function on a personal appearance is much like a new trial following the granting of a new trial by a trial judge. The making of a proper request in writing under the regulations produces as a matter of course under the law a new trial before the board. The new trial or *de novo* function cannot be nullified successfully by saying that the judgment will remain the same. It is the duty of the tribunal to actually conduct a *de novo* trial. When it is not done the law is violated. Such is the case here according to the admitted facts.

It is respectfully submitted that the violation of the regulations by the local board in failing to consider *de novo* the classification of appellant upon his personal appearance and the failure to mail to him a new notice of classification vitiated the order to report. The omission on the part of the local board constitutes ground for a judgment of acquittal.

POINT THREE

Appellant was denied a full and fair hearing upon his personal appearance before the hearing officer in the Department of Justice when that officer failed and refused to give to appellant a full and fair summary of the secret FBI investigative report on the *bona fides* of appellant's conscientious objector claim.

The undisputed evidence in this case shows the appellant wrote the hearing officer in advance of the hearing and re-

quested the adverse evidence. Her reply was that she would give it at the hearing.

When Francy appeared at the hearing the hearing officer gave him one or two small pieces of the adverse evidence. He requested a summary or notification of all the adverse evidence from the FBI reports that she had in her hand.

Therefore there is present in this case no question about the fact that the appellant actually requested upon two occasions that he be supplied with the unfavorable evidence appearing in the secret investigative report.

The report of the hearing officer to the Department of Justice was adverse. Just to what extent she relied on the extensive adverse evidence appearing in the FBI report is not clear. It does appear, however, that there was more adverse evidence in the report than she gave to Francy at the hearing. Under these circumstances it is clear, therefore, that she failed to give Francy a full and fair résumé of the adverse evidence appearing in the report. The principle announced by the Supreme Court in *United States* v. *Nugent,* 346 U. S. 1, was not complied with. The contention here that the defendant was denied a full and fair hearing upon the appearance before the hearing officer is supported by the new regulations of the Department of Justice. These new regulations require that the registrant be supplied with a full and complete summary of the entire FBI report. It was at least the duty of the hearing officer to supply a summary of all the adverse evidence.—*United States* v. *Bouziden,* 108 F. Supp. 395 (W. D. Okla.).

The facts in this point are substantially the same as the facts in the case of *Tomlinson* v. *United States,* No. 13,892, on the docket of this Court. The only difference is that Francy made a written request for the adverse evidence. The hearing officer refused the request and did not adequately comply with the request. The similarity of this case to the case of Tomlinson permits appellant to refer here to the arguments made in the brief for appellant filed in that case. Reference is here made to the brief for appellant filed

in the case of *Tomlinson* v. *United States,* No. 13,892, at pages 30 to 40. The arguments there made are adopted here as though copied at length herein. The Court is here requested to consider those arguments as the basis for Point Three above.

It is respectfully submitted that the procedural rights of the appellant were violated upon the occasion of the hearing in the Department of Justice. The hearing officer failed to give Francy a full and fair summary of the adverse evidence appearing in the secret investigative report of the FBI. The trial court should have found that the hearing officer failed to give a full and fair summary of the adverse evidence appearing in the FBI report to Francy. The motion for judgment of acquittal contained this ground in it as a basis for the motion. The motion should have been granted. The trial court committed error. Therefore this Court should hold that the proceedings in the Department of Justice were destroyed by the failure of the hearing officer to give to appellant a full and fair summary of the FBI report.

The record in this case shows that Francy did voluntarily request the hearing officer to supply any adverse evidence. The undisputed evidence shows, however, that the hearing officer undertook to make a small résumé of the adverse evidence appearing in the report. He did not waive the right to have the full and fair résumé.

Appellant did ask for the FBI report. It is true that he did not use the word "résumé" or the word "summary." He asked that he be supplied the unfavorable or adverse evidence or be given the general nature of it. He wanted to know all the evidence that was unfavorable against him. The fact that he may not have used the word "résumé" or "summary" was not enough to defeat his rights to be confronted with the unfavorable evidence. He asked for all the regulations and the Department of Justice would allow at the time.

The Government may place stress upon the fact that the

appellant in this case did not request that he be supplied a summary of the FBI report. To begin with, the Department of Justice procedure forbade the production of any such summary. There was no provision in the Department of Justice regulations for giving a summary. The procedure providing the summary of the FBI report was not established by the Government until on or about September 1, 1953. This was the first time there ever was any procedure authorizing a registrant to get a summary of the FBI report. Since it was impossible for the registrant to obtain a summary of the FBI report from the hearing officer and, inasmuch as the Department of Justice regulations prohibited the giving of such summary at the time this case was heard by the hearing officer, the argument of the Government (that the appellant failed to request a summary) should be rejected.

It should be remembered that the Supreme Court held in the *Nugent* case that the registrant was entitled to a summary of the FBI report. The notice sent out to registrants stated they could get the general nature of the unfavorable evidence. Since the notice did not give them the right to have a summary of the evidence (which the *Nugent* case held they were entitled to), failure to comply with the notice sent was not a waiver of the right to insist on the subpoena duces tecum in the court below.

Regardless of whether the request was made (for the summary of the unfavorable evidence) it is still the duty of the hearing officer to give the registrant a summary on his own motion. That is positively required now by the regulations of the Department of Justice. The recent amendment to the regulations (requiring a summary of the FBI report to be made for the registrant) is a concession by the Department of Justice that the procedure which it followed before the *Nugent* decision and in this case does not meet the requirement of due process of law and Section 6(j) of the act.

In *United States* v. *Bouziden,* 108 F. Supp. 395 (D. C.

W. D. Oklahoma November 13, 1952), it was held that the registrant was entitled to have a summary of the FBI report produced at the hearing. The court held, however, that the failure of the hearing officer to call the registrant's attention to the substance of the adverse evidence constituted a deprivation of the rights of the registrant. It was said:

> "As directed by the statute the Department of Justice made an appropriate inquiry. Then the hearing was held with the registrant for the purpose of determining the character and good faith of the objections of the registrant to his classification. The undisputed evidence is that no mention was ever made by the hearing officer of the unfavorable information contained in the Federal Bureau of Investigation report. No opportunity was given to rebut this unfavorable information. . . .
>
> " . . . The hearing officer must not be permitted to withhold unfavorable information gained during the inquiry, and giving no opportunity to rebut at the hearing, *then use this same unfavorable information as a basis for his adverse advisory recommendation.* If this is done the hearing itself becomes a sham and a farce. Why hold a hearing to determine a fact if there is a predetermination of the fact and no intent to discuss the basis of the predetermination?"

The court in *United States* v. *Bouziden,* 108 F. Supp. 395 (W. D. Okla. 1952), distinguished the decision in *Imboden* v. *United States,* 194 F. 2d 508 (6th Cir.), certiorari denied 343 U. S. 957, on the ground that the hearing officer provided the registrant in that case with the substance of the unfavorable evidence and that no complaint was made about the failure to answer but that the contention was made that he did not give the names of the informants to the registrant.—Compare *United States* v. *Annett,* 108 F. Supp.

400 (W. D. Okla. 1952); reversed on other grounds, 205 F. 2d 689 (10th Cir.) June 26, 1953.

In *Eagles* v. *Samuels,* 329 U. S. 304, the Supreme Court approved the use of the theological panel. The panel made a report that was made a part of the file. It was available to the registrant. It was not withheld to the injury of the registrant as here. The Court, speaking through Mr. Justice Douglas, held that even the information that was received by the special panel and given to the local board, in order to afford due process, had to "be put in writing in the file so that the registrant may examine it, explain or correct it, or deny it. There is, moreover, no confidential information that can be kept from the registrant under the regulations."—(329 U. S., at p. 313). See also *Degraw* v. *Toon,* 151 F. 2d 778 (2d Cir.); *Levy* v. *Cain,* 149 F. 2d 338 (2d Cir); *United States* v. *Balogh,* 157 F. 2d 939 (2d Cir.); judgment vacated, 329 U. S. 692; affirmed on other grounds, 160 F. 2d 999.

This Court has long ago held that a person appearing before an administrative agency is entitled to be informed of any adverse evidence that may be used against him. *Chen Hoy Quong* v. *White,* 249 F. 869 (9th Cir. 1918), is one of the first cases decided by this Court on this point. In that case the Court held that the failure to disclose a secret and confidential communication relied on by an immigration hearing officer violated the procedural rights to due process of law. This Court set aside an order denying an alien admission to the United States on the grounds that he was not given a full and fair hearing.—See also *Bachus* v. *Owe Sam Goon,* 235 F. 847, 853; *Chin Ah Yoke* v. *White,* 244 F. 940, 942; *Mita* v. *Bonham,* 25 F. 2d 11, 12 (9th Cir.); *Ohara* v. *Berkshire,* 76 F. 2d 204, 207 (9th Cir.).

Even where the facts are actually known to the hearing officer (which is not the case here) the administrator cannot base his decision or recommendation upon it.—*Baltimore & Ohio R. Co.* v. *United States,* 264 U. S. 258 (permitting a railroad to acquire terminal roads); *Southern R. Co.* v. *Vir-*

ginia, 290 U. S. 190, 198; *Market St. Ry.* v. *R. Comm'n of California,* 324 U. S. 548, 562.

In *Degraw* v. *Toon,* 151 F. 2d 778 (2d Cir.), a draft board order was held to violate due process. The board considered evidence that damaged the registrant. It was a letter from two members of the advisory board. The court held that the opportunity to know and rebut damaging evidence goes to the heart of the controversy.—See also *United States* v. *Kowal,* 45 F. Supp. 301 (D. Del.).

It is unnecessary for the administrative agency to accord a judicial trial as a part of due process. (*United States* v. *Ju Toy,* 198 U. S. 253, 263) It is necessary that the procedural steps be otherwise in accordance with the requirements of the Fifth Amendment guaranteeing notice and the right to defend or answer a charge. (*Interstate Commerce Commission* v. *Louisville and Nashville Railroad Company,* 227 U. S. 88, 91-92) The Supreme Court has held that where a statute provides for an administrative hearing the due-process clause of the Fifth Amendment requires a full and fair hearing in the sense of the traditional hearing.—*Shields* v. *Utah Idaho Central R. Co.,* 305 U. S. 177, 182.

It has been held that procedural due process requires that where the facts contained in a secret report are relied on by the administrative agency it must be produced and made available at the trial.

> "If that were not so a complainant would be helpless for the inference would always be possible that the court and the Commission had drawn upon undisclosed sources of information unavailable to others. A hearing is not judicial, at least in any adequate sense, unless the evidence can be known."—Mr. Justice Cardozo in *West Ohio Gas Co.* v. *Public Utilities Comm'n,* 294 U. S. 63, 68, 69.

Another important case on this subject is *Morgan* v. *United States,* 304 U. S. 1. That case presented a question

on the validity of an order of the Secretary of Agriculture. He fixed maximum rates charged by market agencies under the Packers and Stockyards Act. (7 U. S. C. §§ 181-229) The Court held that a fair hearing commanded an "opportunity to know the claims of the opposing party and to meet them." Chief Justice Hughes added that the party was entitled to be "fairly advised" and "to be heard" upon the issues. He said that administrative agencies must guarantee "basic concepts of fair play."—304 U. S., at pages 18, 22. See also *Lloyd Sabaudo Societa Anonima* v. *Elting,* 287 U. S. 329, 335-336.

In *Kwock Jan Fat* v. *White,* 253 U. S. 454, it was held that the suppression or omission of evidence did not allow a fair hearing. It was pointed out that everything relied upon in the administrative determination must be included in the record.—253 U. S., at 464.

In *United States* v. *Abilene & S. Ry. Co.,* 365 U. S. 274, 290, it was held that a party before an administrative agency must be apprised of all evidence submitted and made a part of the determination.—See also *Interstate Commerce Comm'n* v. *Louisville & N. R. Co.,* 227 U. S. 88, 93.

The act and regulations make the recommendations of the Department of Justice to the appeal board merely advisory. They may be rejected by the appeal board. The appeal board may classify a registrant as liable for training and service in the armed forces when the Department of Justice recommends that he be classified as a conscientious objector, or vice versa. The Government argues that, because of this advisory nature of the recommendation, the Department of Justice can successfully refuse to give the registrant due process of law. The Government argues that it is not bound to place all the evidence in the file, as the draft board is required to do, purely because the report is advisory in nature.

It is true that the investigation and recommendation of the Department of Justice are merely advisory. This does

not make the use of the illegal FBI report and the nondisclosure of the names of the informants harmless error. The report was relied on. Were it not for the adverse testimony of anonymous witnesses the claim for conscientious objector classification would not have been denied.

It cannot be said that it is harmless error when the rights of the registrant here were denied by the use of the FBI report by the hearing officer and the appeal board.

The FBI report was embraced, accepted and adopted by the appeal board. The unconstitutional procedure of the Department of Justice was adopted as the unconstitutional procedure of the Selective Service System. The appeal board made the invalid proceedings its own. Since the order to report is based on proceedings had before the Department of Justice, the use of the report by the draft boards vitiated the entire proceedings.

It is harmless if the report of the department is against the registrant and the appeal board grants the conscientious objector status. But when the appeal board accepts the recommendation to deny the status claimed by the registrant an entirely different situation is presented. The hearing officer has and relies on the report of the FBI. The Attorney General, making the recommendation to the appeal board, relies on the report of the hearing officer, which is based on the FBI report. In making the recommendation the Attorney General also has before him the FBI report. He tests the report of the hearing officer with it. His recommendation is based not only on the report of the hearing officer, but also on the FBI secret police report. The board of appeal, in more than ninety cases out of a hundred, relies on the recommendation of the Department of Justice, especially when the recommendation is adverse. In this case the board of appeal accepted

and adopted the recommendation of the Department of Justice, based mainly on the FBI report.

It is, then, only proper, necessary, fair, constitutional and in compliance with due process of law that the summary of the adverse evidence gathered and recorded by the Federal Bureau of Investigation be given to appellant. It was relied on by the hearing officer. The hearing officer's report was relied on by the Department of Justice in making its recommendation to the appeal board and the appeal board relied on the recommendation supported by the FBI report. By all principles of fairness this evidence ought to be made available to the registrant on his trial. Without being provided the summary of the FBI report the registrant is denied the right to show that there is no basis in fact for the determination made by the appeal board based on the recommendations made by the Department of Justice and the hearing officer on the conscientious objector claim of the registrant.—*Estep* v. *United States,* 327 U. S. 114; *Kwock Jan Fat* v. *White,* 253 U. S. 454.

The error and harm produced by not giving a summary of the FBI report can be demonstrated by an analogy. There are certain types of judicial proceedings where the jury verdict is merely advisory. If misconduct of counsel, the jury or the court in violation of constitutional rights occurs in a trial where the verdict is merely advisory, it certainly would be ground for a new trial and reversal on appeal if the unconstitutional proceedings before the jury resulted in the verdict that was accepted by the trial court. This is what happened here. The adverse verdict against the registrant was accepted by the appeal board. The unconstitutional trial before the hearing officer invalidated the proceedings before the appeal board when the Department of Justice recommendation, adopting the hearing officer's report, was followed by the appeal board.

Suppose an attorney, during a trial before a jury in a case where the verdict was advisory, handed to the jury an exhibit that had been excluded from evidence. Also

assume that the adversary did not learn of this until after entry of judgment. Putting aside the liability of the attorney for contempt of court, would it be doubted that the verdict and judgment would be set aside even if the verdict were advisory? The same situation exists here.

A chain is no stronger than its weakest link. The recommendation of the Department of Justice and its acceptance by the appeal board becomes a link in the chain. Since it is one of the links of the chain, its strength must be tested. (*United States* v. *Romano,* 103 F. Supp. 597 (S. D. N. Y. 1952)) The absence of the summary of the FBI report from the record and the withholding of it from the registrant at the hearing produces a break in the link and makes the entire selective service chain useless, void and of no force and effect. The Supreme Court held in *Kessler* v. *Strecker,* 307 U. S. 22, that if one of the elements is lacking, the "proceeding is void and must be set aside." (307 U. S., at page 34) The acceptance of the recommendation of the Department of Justice that has been made up without producing the FBI report to the registrant in the proper time and manner makes the proceedings illegal, notwithstanding the fact that the recommendation is only advisory. The embracing of the report and recommendation by the appeal board jaundiced and killed the validity of the proceedings.

This view of the reliance upon the recommendation of the Department of Justice making the report of the hearing officer and the recommendation a vital link in the administrative chain is supported by *United States* v. *Everngam,* 102 F. Supp. 128 (D. W. Va. 1951). In that case the court said:

> "Under these statutory provisions, the hearing, report, and recommendation of the Department of Justice is an important and integral part of the conscription process for the protection of both the government and the registrant. The de-

fendant had the right to have a fair hearing and a non-arbitrary report and recommendation by the Department of Justice to the appeal board.

"It does not appear that any member of the appeal board felt himself bound by this report and recommendation or how far, if at all, it influenced the decision of the appeal board, but that is not enough. The report and recommendation was transmitted to the appeal board to use as an advisory opinion, and was considered and used (as the regulations require) by the appeal board in its subsequent classification of the defendant."

This quotation was made and approved in *United States* v. *Bouziden,* 108 F. Supp. 395 (W. D. Okla. 1952). It is respectfully submitted that the fact that the act and regulations make the recommendation advisory does not prevent the broken link from ruining the required continuously legal chain.

The making of the report and recommendation by the Department of Justice to the appeal board is after the hearing in the Department of Justice which the registrant attends. Appellant had no opportunity to see the report and recommendation of the Department of Justice until after his conscientious objector claim had been denied by the appeal board. The report and recommendation is sent directly to the appeal board. The registrant never sees this report before the appeal board determination. He has no opportunity to answer the report before the final determination by the appeal board. The making of the report and recommendation to the appeal board, wherein reference is made to the FBI report, does not make the report as available to the registrant as to the appeal board. The appellant was entitled to have this notice sent to him before the final determination by the appeal board. It is therefore erroneous for the Government to argue that the adverse evidence in the FBI report was made available to the appellant. It was

not made available until it was entirely too late for him to do anything about the appeal board determination.

The appellant had the right to see his file after the appeal board finished with and returned its denial of his conscientious objector claims. But this was entirely too late because there was no chance for the appellant to get the appeal board to reconsider his classification.

A speculative argument is made by the Government. It is said that the appeal board acted only on the adverse evidence of the FBI report which is referred to in the report and recommendation of the Department of Justice. The report and recommendation of the Department of Justice to the appeal board never attempts to summarize the FBI report. It merely refers to the FBI report without specifying what part of the report the Department of Justice relies upon. The fact that the appeal board follows the Department of Justice recommendation and denies the conscientious objector status requires the court to speculate as to just what the appeal board did rely upon. Speculation may not be indulged in by the court in a criminal case.—*United States* v. *Alvies,* 112 F. Supp. 618, at page 624; *Estep* v. *United States,* 327 U. S. 114, at pages 121-122.

It is presumed that the appeal board relied on the report and recommendation of the Department of Justice. Since the Department of Justice relies on the entire FBI report, it is necessary to conclude, therefore, that the appeal board is forced to rely on the entire report without seeing it since it adopts the report and recommendation of the Department of Justice.

It is respectfully submitted that the failure on the part of the hearing officer to give a full and fair résumé and summary of the adverse evidence appearing in the FBI report denied appellant due process of law. The denial of the full and fair hearing destroyed the validity of the draft board proceedings. The motion for judgment of acquittal should have been granted. The overruling of the motion and the conviction of the court below constitutes reversible error.

POINT FOUR

The nature of the defenses shows that the appellant was denied procedural due process and that the draft board exceeded its jurisdiction. This makes inapplicable the rule of *Falbo* v. *United States,* 320 U. S. 549, cutting off defenses of illegal classification because of failure to exhaust remedies.

Lack of or excess of jurisdiction could always be shown at the trial for violation of the Selective Service law, even when the courts did not allow any defense during World War II. It was not until 1946, when *Estep* v. *United States,* 327 U. S. 114, allowed classification defenses in a Selective Service proceeding. However, the courts had recognized jurisdictional defenses, even before this decision. Even the decision in *Falbo* v. *United States,* 320 U. S. 549, which did not allow a defense to a registrant who did not appear for induction, did not affect the right to show an induction order void because there was no jurisdiction or that a board had exceeded its jurisdiction.

Since the Government can be made to show that it gave appellant a fair résumé of adverse evidence, how can the Government in advance of trial say that it cannot be made to produce the report? The trial court must examine the FBI report to make its determination as to the fair résumé. The court puts the burden on the Government of proving that it did give a fair résumé. The hearing without such a résumé is devoid of due process of law, and such a matter can always be shown regardless of the question of whether a defendant is permitted to defend. When the hearing officer refused to give appellant a fair résumé of adverse evidence in the FBI report, she exceeded the jurisdiction of the administrative agency. She thereby rendered the entire selective process void. The order of induction was void and did not have to be obeyed. This is what the Court said in *Baxley* v. *United States,* 134 F. 2d 610 (4th Cir. 1943):

> "This is an appeal from a conviction and sentence on an indictment charging a violation of

> the Selective Training and Service Act of 1940 . . . by the failure of appellant to report . . . for the purpose of being inducted into a work camp. . . . [p. 998]
>
> " . . . if the order of the Board is found to lack foundation in law, or to be unsupported by substantial evidence, or to be so arbitrary and unreasonable as to amount to a denial of due process, the court should treat it as a nullity in the same way as if the question arose in a habeas corpus proceeding."

See also on this point the case of *Wells* v. *United States,* 158 F. 2d 932 (5th Cir. 1947):

> "A jury being waived, the appellant was tried and convicted by the Court below for failure to report to his local board for induction into the armed forces of the United States, in violation of 50 USCA App. sec. 311. [p. 933]
>
> "On the trial below, the appellant was not prevented from proving by any evidence available to him that the induction order was invalid. He was accorded every right to which he was entitled under the doctrine of *Estep* v. *United States, supra.* The distinction between the Falbo and Estep cases is this: Falbo failed to report for the last step in the administrative process and, therefore, was denied the right to prove in a criminal trial that the induction order was invalid. Estep appeared at the induction center but refused to submit to induction; thus having pursued his administrative remedy to the end, he was permitted to defend upon the ground that his classification was illegal and his induction unauthorized. Each of the above cases is in point here, but Falbo has such a narrow application that we prefer to put our decision upon the latter case, which held that, where the in-

> duction order was so contrary to law as to exceed the board's jurisdiction, its action might be interposed as a defense in a criminal prosecution. . . ."

It appears clear from the above discussion and cases, that the appellant can show lack of jurisdiction, even despite his failure to appear for induction. He can show that the order had no validity, and that it had no power to compel his report for induction. The *Falbo* case (320 U. S. 549) is limited to defenses and not to jurisdictional matters. This line of reasoning applies to other jurisdictional excesses, besides failure to give appellant a fair résumé of adverse evidence.—See *United States* v. *Everngam,* 102 F. Supp. 128 (W. Va. 1951).

This contention is clearly born out by the case of *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.,* 227 U. S. 88. If the hearing is unfair, it is void. In the *Interstate Commerce* case, *supra,* the Court said (at page 91):

> "But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless . . .
>
> "In the comparatively few cases in which such questions have arisen it has distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair, . . . "

A registrant deprived of a fair hearing can raise the question of jurisdiction at all times, regardless of his having failed to report for induction. See *United States* v. *Laier,* 52 F. Supp. 392 (N. D. Cal. S. D.), at page 395:

> " . . . In the present case, however, the objection

> is not made primarily to the facts as found by the local board but to the fact that defendant was denied his lawful right to appear in person and be heard. This error, it would seem, could be cured only by granting such hearing."

United States v. *Laier, supra,* was decided November 8, 1943, when the courts unanimously held that a defense could not be interposed in a criminal action under any circumstances. But this case allowed a defense based upon jurisdiction. This holding was followed in *United States* v. *Peterson,* 53 F. Supp 760 (N. D. Cal. S. D.). See also *Heflin* v. *Sanford,* 142 F. 2d 798-799; *Tung* v. *United States,* 142 F. 2d 919, 921-922; *United States* v. *Ryals,* 56 F. Supp. 773, 775; *United States* v. *Walden,* 56 F. Supp. 777-778.

The rule stated in *Falbo* v. *United States,* 320 U. S. 549, has been superseded by a change in the draft law.

When *Falbo* v. *United States, supra,* arose, Falbo could not receive a final type physical examination until he appeared at the induction center for induction. It was this that impelled the Court in the *Falbo* case to announce the rule that the physical examination was the final step in the administrative process, because the registrant could be rejected at the induction station. The law was later amended on December 5, 1943, providing for the first time for a preinduction physical examination. The purpose of the preinduction physical examination was to save a registrant embarrassment, if he gave up a job or sold a business, only to find himself rejected at the time of induction. The preinduction examination was to give a registrant a chance to know what he could expect, as to induction.

There is a small but enlightening part of the discussion in the Senate, preceding the enactment of said, amendment, as it appears in 89 Cong. Rec. 8079, 8129-8133:

> Mr. Bushfield (South Dakota):
>
> " . . . By way of explanation, let me say that most of the men whose classifications the Senate

has been discussing have established homes, businesses, or professions. The record of the Selective Service indicates that forty and a fraction per cent of all men called in the United States during the month of August (1943) were deferred because of physical defects. In fairness to the group of men who are about to be called, if the proposed legislation is not passed, we should afford them every possible opportunity to ascertain in advance whether they will be accepted; because it will be found that 4 out of every 10 men in the class which is to be called will be returned to their homes as unacceptable. In most cases those men will either have sold their businesses, closed their offices, or lost their jobs; and it is not fair to call them and later return them to their homes, if there is an opportunity to ascertain in advance whether they are acceptable. . . .

" . . . Evidently the examination is of little value, because the induction center records show that a fraction over 40 per cent of all persons examined at the induction centers are returned to their home as unfit.

I say to the Senate that, inasmuch as we have adopted the policy, it is unfair to the heads of families to force them to close their offices or give up their jobs before they are ordered to the induction centers. We should do everything possible to avoid the situation of having a man give up his job, but subsequently, because he does not pass the physical examination at the induction center, return to his home and have to look for a new job or have to open up another business."

Later in the Senate discussion Senator Barkley remarked:

"Mr. President, . . . I think that at the end of

the amendment the words 'shall be binding upon such board in the same manner as now followed upon examination after induction' should be changed to read: 'Shall be binding upon such board in the same manner as now followed upon examination immediately prior to final induction.' The words 'immediately prior to final induction' would be substituted for the word 'after,' which appears in line 10 after the word 'examination.'

"Mr. Bushfield: I accept the suggestion . . . and ask that the modification in the amendment be made. . . .

"Mr. Pepper: Mr. President, I should like to ask the Senator if he has in mind that the examination should be final for all time?

"Mr. Bushfield: No; no more than at present.

"Mr. Pepper: It is for the particular call?

"Mr. Bushfield: Yes.

"Mr. Pepper: So, if he were to be called again the previous examination would not be a finality?

"Mr. Bushfield: No, and the Selective Service and the draft boards can send a man back as many times as they want to."

After said amendment to the draft law, 50 U. S. C. App. §§ 303, 304(a), 57 Stat. 596, 599, the cases of *Gibson* v. *United States,* 329 U. S. 338, and *Dodez* v. *United States,* 329 U. S. 338, reached the Supreme Court. Dodez had failed to report to a Civilian Public Service camp for work as a conscientious objector, in violation of an induction order. He was convicted for not reporting for induction, not being permitted to interpose a defense under the doctrine of *Falbo* v. *United States,* 320 U. S. 549. When the case reached the Supreme Court it held that since the decision of the *Falbo* case, *supra,* a vital amendment had been incorporated into the draft act. The court held that the provision for the preinduction physical examination did not exist

when Falbo was given notice of induction. It held that this made an essential distinction between the *Falbo* case and the *Gibson* case. It held that when Dodez passed the preinduction physical examination, he had exhausted his administrative remedies. The Court said:

> "Dodez refused to go to camp. . . . " [p. 342]
>
> "However, intermediate the Falbo decision and issuance of the order to Dodez to report, the regulations governing the procedure relating to selection for service were changed and in a manner which Dodez says relieved him from the necessity of going to camp in order to complete the administrative process. The Government now concedes we think properly, that Dodez is right in this view." [p. 344]
>
> "The changed regulations, following out the command of sec. 5 of Public Act 197, provide for a preinduction physical examination to be given before issuance of the order to report for induction, rather than afterward. Sec. 629.1 of Amendment No. 200 (9 Fr 440-42), effective Jan. 10, 1944. *This was the basic amendment.* It applied to all registrants subject to call for service, including those classified 4-E . . . " [p. 347] [Emphasis supplied].
>
> "Although the amended regulations thus speak of 'completing the Order to Report' and of placing on his papers 'a statement that a registrant is accepted,' we agree that these were only formal matters to be performed by camp officials, and left nothing to be done by them or by the applicant after reaching the camp that might result in his being rejected or released from the duty to remain and perform the further duties imposed on him. To construe the regulations otherwise would be to force the registrant not only to perform all requirements affording possibility of relief but

> also to go through with purely formal steps to be taken by camp officials offering no such possibility. Exacting this would stretch the requirement of exhausting the administrative process beyond any reason supporting it. Cf. *Levers* v. *Anderson,* 326 U. S. 219." [p. 349]
>
> "We hold, therefore, in accordance with Dodez' view and the Government's concession, that he was not required to report to camp, under the regulations effective when his order to report became operative, in order to complete the administrative process; and that he therefore was not foreclosed by the Falbo decision from making any defense open to him in his criminal trial under the Statute or the Constitution aside from the effect of the decision. *Estep* v. *United States,* 327 U. S.; *Smith* v. *United States,* ibid; Cf *Billings* v. *Truesdell,* 321 U. S. 542." [p. 350]

This case shows that *Falbo* v. *United States,* 320 U. S. 549, applies only to the circumstances existing under the law in effect at the time of the decision in that case. Under the law in effect, when Dodez did not report for induction in a camp, the administrative remedies, like here, were exhausted after the taking of the preinduction physical examination. It is thus made clear that the law stated in *Falbo* v. *United States, supra,* is not always the yardstick for determining the matter of exhaustion of remedies.

The *Gibson* and *Dodez* cases, *supra,* came up for discussion in the Second Circuit in 1946, in the case of *United States* v. *Balogh,* 160 F. 2d 999. In the *Balogh* case, the defendant had not reported for induction. The Court of Appeals said that it would have followed the law laid down in the *Gibson* and *Dodez* cases if it were not for the wording of the statute as amended in 1946. The Court said that the statute provided for re-examinations and periodic re-examinations and that therefore the preinduction physical was not final, if it had been taken more than 90 days before

the induction order. This 90-day period had been fixed by Army Regulation 615-500(e). The court held further that the army regulation did not violate the law, because the law had provided for periodic re-examination. It will be shown later that the law has no provision now for a periodic re-examination.—See *United States* v. *Balogh,* 160 F. 2d 999 (2d Cir.):

> "Were it not for a circumstance, which we shall mention presently, we should therefore conform to the Supreme Court's order, as we understand it, by merely saying that, for the reasons that we gave in *United States* ex rel. *Kulick* v. *Kennedy, supra,* we held that Balogh had 'exhausted his administrative remedies' before the order of induction was served upon him, and that therefore, by virtue of *Estep* v. *United States,* he was privileged upon his trial to challenge the regularity of the proceedings of the authorities which drafted him. Indeed, as we read *Gibson* v. *United States,* we should have been right in so ruling, had Balogh been physically examined within 90 days before the induction order was served upon him; and it is because he had not been so examined that the appeal takes on a different face. When the case was before us originally we had not discovered the Army Regulation, passed on August 10, 1944 (615-500(e)), the important part of which we quote in the margin; nor did either side call it to our attention. This declared that 90 days after a registrant has been examined his examination becomes void, and that he must be re-examined before induction. On December 12, 1945, Balogh's only physical examination, which had been on April 21st, had therefore ceased to be valid, and he should have been subjected to a new and 'complete examination,' which might have resulted in his exemption or reclassification. Therefore, un-

> less the regulation was itself invalid, he had not 'exhausted his administrative remedies' within *Falbo* v. *United States, supra,* and was not within *Estep* v. *United States, supra.*
>
> "Balogh asserts that he regulation was invalid because it ran counter to the amendment of the Selective Service Act, passed December 5, 1943. . . . Whatever might be the necessary implications from the amendment, if it had been in other words, the language chosen leaves no doubt that it did not have the effect which Balogh desires; for it explicitly declared that the putative physical examination shall be 'subject to re-examinations', and indeed, even more significantly, to 'periodic re-examinations.' These words were an invitation to promulgate just the kind of regulations that the Army did promulgate; it put all registrants on guard that they became 'subject to' a new examination every three months; and it was valid, so far as concerned the amendment."

The *Balogh* case, 160 F. 2d 999 (2d Cir.), is authority for two propositions. It means: (1) that *Falbo* v. *United States,* 320 U. S. 549, does not always make failure to report for induction cause for cutting off defenses in a criminal proceeding; (2) that the law, as amended, allowed for periodic examinations and re-examinations, and thus the Army regulation was valid, but that an army regulation in contravention of law that has no provision for periodic re-examination is not valid to stay a preinduction physical examination from being a completion of the administrative process. The statute that the Court referred to in *United States* v. *Balogh,* 160 F. 2d 999, *supra,* is contained in 57 Stat. at Large 599, sec. 5.

That law went out of existence and in 1948 a new draft law was enacted. This law also provided for preinduction physical examinations. The present law does not provide for periodic examinations or re-examination. See 50 U. S. C.

App. § 454(a). While it is true that the army has a regulation requiring a re-examination before induction, if the preinduction physical examination is more than 120 days old this regulation contravenes the intention of the present law, to make the preinduction physical examination the final step in the administrative process. Under *United States* v. *Balogh,* 160 F. 2d 999 (2d Cir.), *supra,* the present army regulation is *ultra vires,* in this respect.

Appellant has passed his preinduction physical examination and been given a certificate of acceptability. He did everything that was required of him in the administrative process. Any other step was one exacted by the army for its own protection and did not affect the completion of the administrative process.

Since appellant was found acceptable, he was subject to induction as far as completion of the administrative process goes. The army might reject him, but that is for the army and not a matter for completion of the administrative process.

The Government might argue that, if such were the intention, the regulation would have provided for induction of all men forwarded for induction without the clause "and found acceptable will be inducted into the armed forces." They might say this shows that a physical examination was contemplated at the induction station prior to induction. But this does not mean that at all. The requirement for acceptance was inserted to allow for examination and acceptance of delinquents and volunteers, who, under the regulations, may be ordered to report for induction prior to the taking of a preinduction physical examination. See 32 C. F. R. §1630.5; 32 C. F. R. §1628.10; 32 C. F. R. §1631.7(a); 32 C. F. R. §1632.16. Appellant has already been found acceptable, while the volunteer or delinquent has not, and he must undergo a physical examination to comply with the regulation requirement for induction, that is, he must be found acceptable.

While the induction order does state that the inductee

might be rejected at the induction station for physical reasons, this does not affect the matter of exhaustion of remedies. The regulations of Selective Service do not provide for such a form of notice, and, in fact, such a provision of the notice violates the draft act, because it has the effect of ordering men for induction without an acceptance after a preinduction physical examination. The local board had no right to issue the order for induction with the said comment, because it violated 32 C. F. R. § 1628.10, which reads:

> "Every registrant, before he is ordered to report for induction, or ordered to perform civilian work contributing to the maintenance of the national health, safety, or interest, shall be given an armed forces physical examination under the provisions of this part, except that a registrant who is a delinquent and a registrant who has volunteered for induction may be ordered to report for induction without being given an armed forces physical examination."

The local board was under a duty to order a new preinduction physical examination, when it knew his induction was imminent, if his preinduction physical was too old, whether under local board or army rule the first preinduction physical was too old. The induction order was void because it was premature.

The Government may argue that the court overruled this contention in *United States* v. *Balogh,* 160 F. 2d 999 (2d Cir.) *supra.* While the court did say that such practice was an irregularity only, it was deciding the case under the law, as it then existed, providing for re-examination and periodic re-examination. There is no provision in the present law providing for re-examination or periodic examination. The provision for re-examination validated the army regulation, and made the early induction order a mere irregularity, in *United States* v. *Balogh, supra.* The induction order would be void otherwise, because a prein-

duction physical examination must now precede an induction order.

An interpretation that requires two physical examinations to be had for the purpose of exhausting administrative remedies is stretching the intent of Congress beyond any good reason. An appellant should not be deprived of important defenses in a prosecution involving a felony, jail sentence, and loss of civil rights on strict procedural interpretations.

The law and regulations, on this point, should be construed in favor of a registrant-appellant. This contention is upheld by Judge McGrannery in Ex parte *Fabiani,* 105 F. Supp. 139 (E. D. Pa.):

> "*Gibson* v. *U. S.,* 329 U. S. 338, presents an interesting variation of the Estep theme, and shows that the Supreme Court is tending to broaden the remedies of the Selective Service registrant. . . ." [p. 145]
>
> "In addition to a desire to avoid the marching up the hill and down again condemned by the Supreme Court in *Estep* v. *U. S.,* 327 U. S. 114, 125, another strong consideration moves this Court to intervene to protect the rights of petitioner, even though he has not reported for a preinduction physical examination or for induction. The consideration is the difference in purpose between the 1940 Act on the one hand and the 1948 and 1951 Acts on the other. The first was enacted when Europe was already at war; when Belgium, Holland, Norway, Denmark, and France had already been overrun by Nazi Germany, and Great Britain seemed about to be devoured in its maw. During by far the greater part of the operation of the Act, the United States itself was at war, locked in deadly embrace with predatory and militaristic powers. Draft quotas ran to 300,000 and

400,000 men a *month*. The keynote was urgency, speed, and a sense of immediate peril. This is sharply revealed in the opinion of Mr. Justice Black for the Supreme Court in *Falbo* v. *U. S.*, 1944, 320 U. S. 549, 551:

"'When the Selective Service and Training Act was passed in September 1940, *most of the world was at war*. The preamble of the Act declared it *"imperative to increase* and train the personnel of the armed forces of the United States." The *danger of attack* by our present enemies, if not imminent *was real,* as subsequent events have grimly demonstrated. *The Congress was faced with urgent necessity of integrating all the nation's people* and forces for national defense. That *dire consequences* might flow *from apathy and delay* was well understood. Accordingly the act *was passed to mobilize national manpower* with the *speed* which the necessity and understanding required.' (Italics ours.)"

"The purpose of the 1948 and 1951 Acts, to the contrary, is merely to achieve and maintain sufficient armed strength to deter aggression; it is not to prepare for war . . . Thus, in contrast to the 'imperative' terminology in the preamble to the Act of 1940, we find in the introduction to the Act of 1948:

"'The Congress hereby declares that an *adequate* armed strength must be *achieved and maintained* to insure the security of this nation.' 62 Stat. 605. (Emphasis added)." [p. 145]

"The preamble to the Act of 1951 contains identical language. [50 USCA App. 451] . . ."

"The different objective to be achieved by the new Act behooves us to employ a more liberal standard of judicial review, so as better to protect the rights of the individual. Should—what

> God forbid—world tensions increase greatly or should general war come, then the judicial arm can once again cut to the barest minimum its supervision of the operations of the draft." [page 146]
>
> "We think that the different objective of the 1948 and 1951 Acts has been recognized by numerous Courts, and that they are consequently more willing to scrutinize the actions of the local boards. (Cf. Horowitz, 'Rights of a Registrant under the Selective Service Law,' 7 Intramural Law Review of N. Y. U. 106 (Jan. 1952).) Thus in *Tomlinson* v. *Hershey,* (E D Pa. 1949), (95 Fed. Supp. 72), Judge Ganoy of this Court refused to dismiss a complaint for an injunction and a declaratory judgment brought by a registrant against the authorities of Selective Service, even though he had not reported for induction as ordered. . . ." [page 147]

In view of the liberal interpretation of the new draft act, so eloquently expressed by Judge McGrannery, this Court should not construe that act that has dropped the requirement for periodic re-examination, to compel a registrant to exhaust his remedies both during the administrative process and then again at the induction station, just before induction. Liberal construction should not be used to deprive an appellant of valuable defenses. The *Fabiani* case was mentioned with approval in *United States* v. *Graham,* 108 F. Supp. 794. This case was decided by Judge Brennan in the Northern District of New York. The court said at page 797:

> "In the present case of Ex parte *Fabiani,* D. C. 105 F. Supp. 139, there is discussed the increasing willingness of Courts to scrutinize the action of local boards, and the cases cited above, together with *U. S.* v. *Strebel,* D. C., 103 F. Supp. 628, are

indicative of the fact that the regulations must be strictly construed in favor of the registrant."

It is respectfully submitted, therefore, that the trial court had the right to pass upon the defenses made to the indictment and that the rule of *Falbo* v. *United States,* 320 U. S. 549, does not apply here to stop consideration of any of the points raised in this case.

CONCLUSION

WHEREFORE appellant prays that the judgment of the court below be reversed and the cause be remanded with directions to enter a judgment of acquittal and discharge the appellant.

Respectfully,

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Counsel for Appellant

December, 1953.

No. 13940

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES ROLLAND FRANCY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

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REPLY BRIEF OF APPELLEE.

I.
STATEMENT OF JURISDICTION.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California on November 19, 1952, under Section 462 of Title 50, App., United States Code.

On December 18, 1952, the appellant was arraigned, entered a plea of not guilty, and the case was set for trial on March 18, 1953.

On March 18, 1953, appellant was tried in the United States District Court for the Southern District of California before the Honorable William C. Mathes, sitting without a jury, and was found guilty as charged in the Indictment.

On April 7, 1953, appellant was sentenced to imprisonment for a period of four years and judgment was so entered. Appellant appeals from this judgment.

The District Court had jurisdiction of this cause of action under Section 462 of Title 50, App., United States Code, and Section 3231 of Title 18, United States Code.

This Court has jurisdiction of the appeal under Section 1291 of Title 28, United States Code.

II.
STATUTES INVOLVED.

The Indictment in this case was brought under Section 462 of Title 50, App., United States Code.

The Indictment charges a violation of Section 462 of Title 50, App., United States Code, which provides, in pertinent part:

> "(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said section] . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . ."

III.

STATEMENT OF THE CASE.

The Indictment charges as follows:

"Indictment

[U. S. C., Title 50, App., Section 462—Universal Military Training and Service Act.]

The grand jury charges:

Defendant James Rolland Francy, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 85, said board being then and there duly created and acting, under the Selective Service System established by said act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class I-A-O and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on July 10, 1952, in Los Angeles County, California, in the division and district aforesaid; and at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and neglected to report for induction into the armed forces of the United States as so notified and ordered to do."

On December 8, 1952, appellant appeared for arraignment and plea, represented by J. B. Tietz, Esq., before the Honorable Ernest A. Tolin, United States District Judge,

and entered a plea of not guilty to the offense charged in the Indictment.

On March 18, 1953, the case was called for trial before the Honorable William C. Mathes, United States District Judge, sitting without a jury, and the appellant was found guilty as charged in the Indictment.

On April 7, 1953, appellant was sentenced to imprisonment for a period of four years in a penitentiary.

Appellant assigns as error the judgment of conviction on the following grounds:

A—The District Court erred in failing to grant the Motion for Judgment of Acquittal duly made at the close of all the evidence.

B—The District Court erred in convicting the appellant and in entering a judgment of guilt against him.

C—The District Court committed reversible error in refusing to hold that there was no basis in fact for the denial of the conscientious objector status, that the classification was arbitrary and capricious, and that appellant was denied his procedural rights to due process of law.

IV.

STATEMENT OF THE FACTS.

On May 8, 1950, James Rolland Francy registered with Local Board No. 85, Burbank, California. He was nineteen years of age at the time, having been born on November 5, 1931.

On January 4, 1951, James Rolland Francy filed with Local Board No. 85 SSS Form 100, Classification Questionnaire.

SSS Form 150, Special Form for Conscientious Objector, was furnished Francy, and he completed this form and filed it with Local Board No. 85. Francy claimed to be a conscientious objector because of his religious training and belief. He was classified I-A-O on January 25, 1951, and was mailed SSS Form 110, Notice of Classification.

On January 31, 1951, Francy requested a personal appearance before the Local Board and at the same time appealed his classification. A personal appearance before the Local Board was granted for February 8, 1951.

On February 8, 1951, Francy appeared before the Local Board. Francy was continued in Class I-A-O.

On March 14, 1951, the Appeal Board reviewed Francy's Selective Service file and determined that he was not entitled to a classification in either a class lower than IV-E or in Class IV-E.

On January 18, 1952, Francy was granted a hearing before the Hearing Officer at the Department of Justice.

On January 28, 1952, the Hearing Officer of the Department of Justice recommended that Francy be classified in Class I-A-O.

On March 31, 1952, Francy was classified I-A-O by the Appeal Board and he was advised of this action.

On June 20, 1952, SSS Form 252, Notice to Report for Induction, was mailed to Francy, ordering him to report for induction into the armed forces of the United States on July 10, 1952, at Los Angeles, California.

On July 10, 1952, Francy failed to report for induction, as ordered.

V.
ARGUMENT.

A. The Denial of the Claim of the Appellant for Classification in Class IV-E Was Not Arbitrary, Capricious and Without Basis in Fact.

The classification of registrants by Local Boards is provided by 50 U. S. C. A., App., Section 460, which provides in pertinent part:

> ". . .
>
> (b) The President is authorized—
>
> (3) To create and establish . . . local boards . . . Such local boards, . . . shall, under rules and regulations prescribed by the President, have the power . . . to hear and determine, . . . all questions or claims, with respect to inclusion or exemption or deferment from, training and service under this title (said sections), of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final, except where an appeal is authorized and is taken in accordance with such rule and regulations as the President may prescribe . . ."

The limitations placed upon a trial court in the review of the classification given a Selective Service registrant were defined in the case of *Cox v. United States,* 332 U. S. 442. The Court in the *Cox* case, *supra,* says at page 448:

> "The scope of review to which petitioners are entitled, however, is limited; as we said in Estep v. United States, 327 U. S. 114, 122-3: 'The provision making the decisions of the local boards "final" means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means

that the *courts are not to weigh the evidence* to determine whether the classification made by the local boards was justified. *The decisions of the local boards made in conformity with the regulations are final even though they maye be erroneous.* The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.' " (Emphasis added.)

Appellant contends that there is no contradictory evidence in the file disputing appellant's statements as to his conscientious objections or veracity, and that therefore, the action of the Board in classifying him in Class I-A-O was arbitrary, capricious and without basis in fact. A reading of the appellant's Selective Service file, would indicate the contrary.

Selective Service Regulations, Section 1622.6 (32 C. F. R. 1622.6) provided:

"1622.6 Class I-A-O: Conscientious Objector Available for Noncombatant Military Service Only.—

(a) In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces.

(b) Section 6(j) of Title I of the Selective Service Act of 1948, provides in part as follows: 'Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.' "

Selective Service Regulations, Section 1622.20 (32 C. F. R. 1622.20) provided:

"1622.20 Class IV-E: Conscientious Objector Available for Civilian Work Contributing to the Maintenance of the National Health, Safety or In terest—

(a) In Class IV-E shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.

(b) Section 6(j) of Title I of the Selective Service Act of 1948 provides in part as follows: 'Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.' "

These sections of the Selective Service Regulations define in broad terms the qualifications necessary for classification as a conscientious objector in classifications I-A-O and IV-E. The application of these descriptions to particular registrants is a duty imposed upon the Local Boards. The Local Board was left to determine how and when a registrant claiming exemption from military service by reason of conscientious objection was to be qualified. The exercise of that discretion, even though it may have been erroneous, is final in the absence of arbitrary or capricious conduct on the part of the Local Board so classifying a registrant.

Cox v. United States, supra.

To aid the Local Board in its determination of the conscientious objector claims of registrants, the Selective Service System uses SSS Form 150, Special Form for Conscientious Objector. The questions and answers given thereto by a registrant are the basis of a classification by a Local Board within the broad terms of Selective Service Regulations, Section 1622.6 and 1622.20. The burden is upon the registrant to maintain and prove his claim within these categories. *Davis v. United States,* 203 F. 2d 853. This burden was not met by the appellant in the present case as evidenced by the classification given him by the Local Board.

A reading of the record in the instant case presents no circumstances which disclose any bias, prejudice, or unreasonable conduct on the part of the Local Board in the classification of the appellant. From the answers given in appellant's SSS Form 150, the local and appellate boards could reasonably find that the appellant was entitled to a classification in Class I-A-O but not in Class IV-E.

The Trial Court, therefore, properly denied appellant's Motion for Judgment of Acquittal.

B. Appellant Was Classified De Novo Following His Personal Appearance as Required by Section 1624.2 of the Selective Service Regulations.

The law presumes that the Local Board has acted within the scope of the regulations and has done its duty properly.

Koch v. United States, 150 F. 2d 762.

Neither the evidence presented by the appellant nor the evidence adduced from the Selective Service file introduced by the Government as its Exhibit 1, show any

facts which could overcome the presumption that the regular and normal procedures provided by the regulations had been followed by the Local Board.

Appellant was continued in Class I-A-O following his personal appearance before the Local Board. He was notified of that action. He was subsequently afforded an appeal and that appeal was heard. He cannot now be heard to complain that he was prejudiced by the action of the Local Board in continuing his classification of I-A-O.

Tyrrell v. United States, 200 F. 2d 8 (9th Cir.).

C. Appellant Was Given a Full and Fair Hearing Before the Hearing Officer of the Department of Justice.

Section 6(j) of the Universal Military Training and Service Act, 50 U. S. C. App., Section 456(j) (62 Stat. 609), provides for a hearing by the Department of Justice. The Supreme Court in the case of *United States v. Nugent,* 346 U. S. 1, has enunciated the principle that a registrant should be given a "fair résumé" of the contents of the investigative report of the Federal Bureau of Investigation when the registrant requested it pursuant to the procedure set up by the Attorney General. In the present case, the appellant requested the adverse information the Hearing Officer had in her possession. It was given to him pursuant to that request. The record does not indicate, nor was there any evidence presented at the trial, that adverse information in the possession of the Hearing Officer and considered by her was not given to the appellant. The testimony of the appellant himself would indicate that it was. [Tr. pp. 52-53.][1]

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[1]"Tr." refers to "Transcript of Record."

Appellant was afforded due process in every stage of his classification. The Trial Court, therefore, properly denied his Motion for Judgment of Acquittal.

VI.
CONCLUSION.

Appellant was properly classified in Class I-A-O.

Appellant was classified *de novo* following a personal appearance, as required by the Selective Service Regulations.

Appellant was afforded all his rights under the Universal Military Training and Service Act.

It is, therefore, respectfully submitted that the judgment of conviction should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

MANLEY J. BOWLER,
Asst. United States Attorney,
Chief of Criminal Division,

MANUEL L. REAL,
Asst. United States Attorney,

Attorneys for United States of America, Appellee.

No. 13940

United States Court of Appeals

FOR THE NINTH CIRCUIT.

JAMES ROLLAND FRANCY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York
Counsel for Appellant

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Cases Cited

Statutes and Regulations

No. 13940

United States Court of Appeals
FOR THE NINTH CIRCUIT.

JAMES ROLLAND FRANCY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

MAY IT PLEASE THE COURT:

Rather than repeat here the information appearing in the appellant's reply brief filed in the companion case of *Clair Laverne White* v. *United States of America*, No. 13893, filed in this Court, references will be made to that brief.

I.

It is stated by appellee, at page 7 of its brief, that there was contradictory evidence disputing his statements in the file. The appellee refers to no particular part of the file to prove this assertion. The contention of appellee should be rejected because it is without basis in fact.

II.

The appellee argues, at page 8 of its brief, that the local board should be left to determine the qualification of the registrant for the exemption. No reasons are given for this assertion. This argument is answered in the reply brief of the companion case, *Clair Laverne White* v. *United States of America,* No. 13893, filed in this Court, under Point III.

III.

It is stated, at page 8 of appellee's brief, that there is no showing of arbitrariness and capriciousness in the classification. The I-A-O classification on its face is arbitrary and capricious. It is a compromise classification in the face of undisputed evidence showing Francy to be opposed to both combatant and noncombatant military service. For answer to this argument of appellee, see pages 16-22 of appellant's main brief.

IV.

Appellee argues, at pages 9-10 of its brief, that there was a presumption of regularity of administrative proceedings to support the action of the board, citing *Koch* v. *United States,* 150 F. 2d 762 (4th Cir.). The presumption of regularity of administrative proceedings does not exist where it is shown, as here, that the local board has violated the law, in denying Francy the right to have a full and complete discussion of the classification as guaranteed by Section 1624.2 (b) of the regulations.

CONCLUSION

It is submitted that the judgment of the court below should be reversed and the appellant ordered acquitted.

Respectfully,

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York
Counsel for Appellant

No. 13941

United States
Court of Appeals
for the Ninth Circuit

CHARLES WILLIAM AFFELDT, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—10-23-53

No. 13941

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CHARLES WILLIAM AFFELDT, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

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Transcript of Record

Appeal from the United States District Court for the Southern District of California Central Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

J. B. TIETZ,
257 So. Spring St.,
Los Angeles 12, Calif.

For Appellee:

WALTER S. BINNS,
United States Attorney;

MARK P. ROBINSON,
MANUEL REAL,
Assistants U. S. Attorney,
600 Federal Bldg.,
Los Angeles 12, Calif.

In the United States District Court in and for the Southern District of California, Central Division

No. 22,595 CD

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES WILLIAM AFFELDT, JR.,

Defendant.

INDICTMENT

[U.S.C., Title 50, App., Sec. 462—Universal Military Training and Service Act.]

The grand jury charges:

Defendant Charles William Affeldt, Jr., a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 81, said board being then and there duly created and acting, under the Selective Service System established by said act, in Ventura County, California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class I-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on November 13, 1952, in Los Angeles County, California, within the Central Division of the Southern Dis-

trict of California; and on or about said date in Los Angeles County, California, within the division and district aforesaid, the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do.

A True Bill.

/s/ LAWRENCE L. ROGERS,
Foreman.

/s/ WALTER S. BINNS,
United States Attorney.

ADM:AH

[Endorsed]: Filed December 3, 1952. [2*]

United States District Court for the Southern District of California, Central Division

No. 22,595-Cr. Indictment
[1 Count—for violation of 50 U.S.C. § 462.]

UNITED STATES OF AMERICA,

vs.

CHARLES WM. AFFELDT, JR.

JUDGMENT AND COMMITMENT

On this 7th day of April, 1953, came the attorney for the government and the defendant appeared in

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

person and with his attorney, J. B. Tietz, Esquire.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a finding of guilty of the offense of having on November 13, 1952, in Los Angeles County, California, knowingly failed and neglected to perform a duty required of him under the Universal Military Training and Service Act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do, as charged in the Indictment; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four years in an institution to be selected by the Attorney General of the United States or his authorized representative for the offense charged in the indictment.

It Is Adjudged that execution be stayed until 4 p.m. on Thursday, April 9, 1953, and that the bail of the defendant be exonerated upon surrender of the defendant to the United States Marshal at or prior to 4 p.m. on April 9, 1953.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the

United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ WM. C. MATHES,
United States District Judge.

EDMUND L. SMITH,
Clerk

By /s/ P. D. HOOSER,
Deputy Clerk.

[Endorsed]: Filed April 7, 1953. [8]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Appellant, Charles William Affeldt, Jr., resides at Rt. 3, 201 Conejo Rd., Ojai, California.

Appellant's attorney, J. B. Tietz, maintains his office at 534 Douglas Building, 257 South Spring Street, Los Angeles 12, California.

The offense was failing to submit to induction, U.S.C., Title 50 App., Sec. 462—Selective Service Act, 1948.

On April 7, 1953, after a verdict of Guilty, the court sentenced the appellant to four years confinement in an institution to be selected by the Attorney General.

I, J. B. Tietz, appellant's attorney being authorized by him to perfect an appeal do hereby appeal

to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

/s/ J. B. TIETZ,
Attorney for Appellant.

[Endorsed]: Filed April 7, 1953. [9]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

The following are herby designated as the record which is material to the proper consideration of the Appeal filed by Charles William Affeldt, Jr. in the above-entitled cause:

1. Indictment.
2. Reporter's Transcript (as requested of Reporter.)
3. All Exhibits in evidence or proffered are to be transmitted to the Court of Appeals as provided by Rule 75 (O) R.C.P. and Rule 11 of the U.S.C.A. for the Ninth Circuit.
4. Notice of Appeal.
5. Designation of Record.
6. All Stipulations.

/s/ J. B. TIETZ,
Attorney for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed June 29, 1953. [11]

In the United States District Court, Southern District of California, Central Division

No. 22,595-Crim.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHARLES WILLIAM AFFELDT, JR.,
Defendant.

Honorable William C. Mathes, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiff:

WALTER S. BINNS,
United States Attorney, By

MANUEL REAL,
Asst. United States Attorney.

For the Defendant:

J. B. TIETZ, ESQ.

Thursday, March 12, 1953, 1:30 P.M.

The Court: No. 22,595, United States vs. Affeldt.

Mr. Tietz: Defendant is ready, your Honor.

Mr. Real: Ready for the Government, your Honor.

The Court: The defendant is present?

The Defendant: Yes, sir.

The Court: It appears that on January 5, 1953,

there was approved and filed a waiver of trial by jury and waiver of special findings of fact, pursuant to Rule 23(a). I assume the defendant still desires to proceed without a jury?

Mr. Tietz: Yes, your Honor.

The Court: Very well. You may proceed, Mr. Real.

Mr. Real: The Government will waive its opening statement.

Your Honor, pursuant to a stipulation marked Government's Exhibit 1-A:

"It Is Hereby Stipulated and Agreed by and between the United States of America, Plaintiff, and Charles William Affeldt, Jr., Defendant, in the above-entitled matter, through their respective counsel, as follows:

"That it be deemed that the Clerk of Local Board No. 81 was called, sworn and testified that:

"1. She is a clerk employed by the Selective [3*] Service System of the United States Government.

"3. As Clerk of Local Board No. 81, she is legal custodian of the original Selective Service file of Charles William Affeldt, Jr.

"4. The Selective Service file of Charles William Affeldt, Jr. is a record kept in the normal course of business by Local Board No. 81, and it is the normal course of Local Board No. 81's business to keep such records.

"It Is Further Stipulated that a photostatic copy of the original Selective Service file of Charles William Affeldt, Jr., marked 'Government's Exhibit 1' for identification, is a true and accurate

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

copy of the contents of the original Selective Service file on Charles William Affeldt, Jr.

"It Is Further Stipulated that a photostatic copy of the Selective Service file of Charles William Affeldt, Jr., marked 'Government's Exhibit 1' for identification, may be introduced in evidence in lieu of the original Selective Service file of Charles William Affeldt, Jr.

"Dated this 9th day of March, 1953."

Signed by myself on the part of the Government, by Mr. Tietz as attorney for the defendant, and by the defendant, your Honor. [4]

Pursuant to the stipulation we move that the photostatic copy of the Selective Service file of Charles William Affeldt, Jr. be introduced into evidence at this time.

The Court: Is there objection?

Mr. Tietz: No objection.

The Court: The file will be received into evidence as Exhibit 1, and the stipulation just read into the record will be received as Exhibit 1-A.

The Clerk: Government's Exhibit 1 received in evidence and Government's Exhibit 1-A received in evidence.

Mr. Real: Pursuant to a stipulation between counsel for the defendant and myself, your Honor, I have here a three-page document entitled Notice of Hearing and Instructions to Registrants Whose Claims for Exemption as Conscientious Objectors Have Been Appealed.

It is stipulated that this is an exact copy, except for the blank spaces, that the defendant received

pursuant to his request for a hearing before the hearing officer. May it be received in evidence as Government's Exhibit 2?

The Court: Do you offer so to stipulate?

Mr. Tietz: Yes, your Honor.

The Court: As I understand the stipulation it is this: That the document now offered is a true copy, except for dates and names, of a Notice and Instructions sent by the hearing officer and received by this defendant 10 or more days prior [5] to the date fixed for the hearing before the hearing officer.

Mr. Tietz: Yes, your Honor.

The Court: Very well. It will be received in evidence as Exhibit 2.

Mr. Real: With that evidence the Government rests its case.

The Court: The defense.

Mr. Tietz: At this time the defendant will advance six points for consideration of the court for a judgment of acquittal. The first one is based on the fact that the file—I believe it will be page 11—in any event, it is the part of the classification questionnaire, the back sheet of it has the minutes of actions.

The Court: The minutes appear to be on pages 11, 12 and 13.

Mr. Tietz: Yes. This was a rather long one. In any event, the initial matter that I wish to invite the court's attention to will be on page 11, and that is the fact, as shown on this page, that on October 23, 1951, the III-A deferred classification that this defendant had been enjoying was taken away and

a higher classification, namely, I-O was given; and there is nothing in the file to support a change from a good classification to one not so good.

The cases that help on that point are the Rusk case and the Stanziali case. Those cases cover two points: One, when [6] a local board reclassifies a registrant without a basis of fact, that is, anew, it is acting beyond its jurisdiction; and they also say that when it does it without a basis of fact, it is acting arbitrarily.

And then there is still a third point that I think I should mention at this time in connection with that, that the regulations mandatorily require that when a registrant is considered for a classification he be considered for the classification first less, and a III-A classification is lower than a I-O classification.

So that all comes back to the point I have argued a number of times, your Honor, and I won't go into at length, that when a registrant meets the qualifications of a lower classification, he must be given that regardless of what the board would like to do.

(Argument omitted from transcript upon request of counsel.)

Now, your Honor, we come to our second point. It is entirely separate from this other point, although it is based on the same facts. And this next point I am making will be shown to exist in the file by your Honor looking at page 33, which is the minute memorandum of October 23, 1951, showing that the reason given by the board itself for making

this change from a III-A to a I-O was because of something that they term a "memorandum, dated October 16, 1951." [7]

Now, my complaint on that procedure and my justification for labeling it a denial of due process is based on this: The Selective Service System has a considerable number of inter-departmental memos, some of them printed with as much care and in all appearances similar to regulations, those that they call local board memoranda; others are merely offset printed, others are mimeographed. They go by various names—SHQ's form, state headquarters memorandum, Selective Service News, which is a magazine, and they contain in most instances directions to the local board.

Now, when those directions cover such subjects as the size of the paper or the color of the ink, no registrant probably would have a right to object. But when those directions influence the local board to act contrary to the regulations published in the Federal Register and available to all lawyers—these others you can't get—I might state here very briefly I tried to get them by sending coupons and money and charge accounts to the superintendent of documents. He does not have them. I have asked the National Headquarters, the State Headquarters, and I do not doubt that their answer is correct—they are short of paper and short of funds. So that I can't get them by buying or begging for them. I can see them occasionally by going to a local board and in that way I have a little chance,

but the ordinary registrant and the ordinary lawyer does not even [8] know of their existence.

That practice is condemned in the case of Barriel, a case that arose in this District. The citation for the Barriel case is 101 Fed. Supp. 348; and there it was held that when one of these interdepartmental memos advised a board to do something to the prejudice of registrant, contrary to the regulations—in this case, as I pointed out in my previous point, the regulations say he should have the III-A—that that is a denial of due process. In that particular instance the petitioner was taken out of the Marine Corps, which is a rather serious step, of course, the judge is reluctant to take.

My next point is that, although the registrant, now the defendant, had considerable evidence in his file that he was a minister—enough to be persuasive to many people and perhaps to all people except this particular board—he was not given the IV-D classification which is in the ranking that is set forth in the regulations, a lower or a better, to use another term, classification than even the III-D.

The Court: Let us not worry about those points. It is my view all of that has been superseded. You may state them in the record, but do not spend any time on them because defendant here was later classified by the appeal board I-O. That in my view, superseded everything that had been done before. [9]

You may state any points you have. I am referring to any discretion that was exercised before. I am not referring to any omissions of administrative due process.

Mr. Tietz: Well, your Honor, I would want hastily to offer the matters that are in the file, the evidence that he presented. I will just really recite them.

The Court: It is the matter of argument and we are just taking time. You make your point on the record. To my view the point has no materiality, Mr. Tietz. I am just saying that to save time.

Mr. Tietz: Would your Honor listen to this part of that point: That the summary of the personal appearance hearing shows a misconception of the law and, therefore, had an adverse influence on the appeal board decision? I would like to go into that if the court would consider it something that might influence your Honor's decision.

The Court: The appeal board presumably knew the law, even if the Local Board did not.

Mr. Tietz: Well, there are cases that say that when something might influence them, that it should not be in the record.

Then I will go to my next point, that the appeal board changed the I-O classification to a I-A, and that is the February 19, 1952, entry shows no reason and that there was no reason in fact in the file to justify it. [10]

The Court: Did the appeal board make the change or the local board make the change first?

Mr. Tietz: I had better refresh my memory.

The Court: In December of 1951 the appeal board—December 11, 1951, according to page 11, the minutes on page 11 of Exhibit 1, the file here,

the defendant was classified I-O by the appeal board.

On February 19, 1952, he was classified I-A, apparently by the Local Board.

February 27th he requested a personal appearance which was granted, and it was held on March 4th; and on March 4th, classified I-A.

Form 110 was then mailed on March 4th and appeal taken on March 13th, all in 1952.

March 18th, final review by the board.

April 23rd, the appeal board reviewed registrant's file and determined that registrant should not be classified in either Class I-A-O or Class I-O under the circumstances set forth in subparagraphs (2) or (4) of paragraph (a) of Section 1626.25.

So that we have, apparently after the Local Board had classified the defendant I-O on October 23, 1951, a grant of registrant a personal appearance on November 6, 1951, and had continued the I-O classification on November 6, 1951.

And again, on November 13, 1951, when there was an appeal, [11] the registrant was classified in I-O by the appeal board.

Then on February 19, 1952, the Local Board reclassified the registrant I-A, and upon appeal they reclassified him the same classification following a personal appearance, and the appeal board in effect confirmed by classifying him I-A.

I take it your point is that there was no basis of fact for the change in classifications.

Mr. Tietz: Any sufficient basis in fact.

The Court: From I-O to I-A.

Is there any reason appearing in the file for this action?

Mr. Tietz: Yes, there are a number of letters that came in that could be used as a reason. And my argument will be that they are insufficient.

The Court: Will you cite me to those letters?

Mr. Tietz: I am not prepared to.

The Court: You proceed, then, on your motion. I have that point.

Mr. Tietz: In the very end he got the full appellate procedure that is accorded the conscientious objector in that he had the hearing officer hearing and had the advisory letter placed in his file after having been sent to the appeal board, the advisory letter from the Attorney General.

Now, we submit that there was a denial of due process there in that the Attorney General made an illegal conclusion and an illegal argument to the appeal board, in that he [12] confused and failed to make a distinction between war and the use of force. The Attorney General advised the appeal board that, because this individual was not wholly averse to the use of force, he therefore was not a conscientious objector, was not one who objected to participation in war. That matter, I believe, has been argued to your Honor, not by myself but in other matters, so that your Honor is generally familiar with that argument.

(Argument omitted from transcript.)

My sixth point that I wish to submit to the court's attention is a bit unique in that we have not had it before.

The court will notice by looking at the Stipulation that was entered into that something was Xed out, and that part that was Xed out is the part that this defendant was a registrant of this board. If this defendant is not a registrant of this board, it had no jurisdiction over him and he is improperly before the court.

The Court: Why isn't he a registrant?

Mr. Tietz: He never signed the registration card. There might be an argument about waiver and all, but I would like to reply when that argument is made.

The Court: Did he refuse to register?

Mr. Tietz: No, sir; just isn't registered. That is why we Xed that out. There is something in the file that comments on that. He never signed a registration card. [13]

I do not particularly like to make a defense based on some little inadvertence, but I think every defendant is entitled to every defense, especially in a Selective Service case where the field is so narrow. In other words, if I can procure from him even on such a technicality an opportunity to go through the Selective Service process again, I think he can profit by it and would come out with a classification more in accord with what his evidence is.

The Court: You are pointing to the first page of Government's Exhibit 1, the reverse side of the photostatic copy of the reverse side of the registration card where the signature of registrant is absent, is that it?

Mr. Tietz: That is the registration card. And

then there is some inter-departmental correspondence in which that is taken up, so that it was recognized that this particular defendant had not technically become a registrant of the board.

The Court: Anything further?

Mr. Tietz: No.

The Court: The motion for a judgment of acquittal will be denied, with the privilege, of course, as the rules provide, to renew the motion or to make another motion to like effect upon the close of all the evidence. I will hear the defense evidence.

Mr. Tietz: The defendant will take the witness stand. [14]

Defendant's Case in Chief

CHARLES WILLIAM AFFELDT, JR.

the defendant herein, called as a witness in his own behalf, being first sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Charles William Affeldt.

Direct Examination

By Mr. Tietz:

Q. I am going to hand you two sheets of paper as soon as the United States Attorney is through perusing them and ask you if you can identify them. Can you tell us——

Mr. Real: I think it is proper to raise the objection now to the exhibits before the defendant, in that they cover matter which is matter denied

(Testimony of Charles William Affeldt, Jr.)

him to use in a record of this sort by the Cox case, as to determine as to whether he is or is not a minister, by people who knew him outside.

The Court: I do not know what the documents are. The witness has not answered the question pending. Objection overruled. Do you know what the documents are?

The Witness: Yes, I do.

The Court: What are they?

The Witness: They are documents submitted to Nathan O. Freedman, my hearing officer. They are affidavits, in effect, that were signed by persons known to me who testify that I was a minister. They are parties related to my case [15] which I submitted to Nathan O. Freedman at the time of my hearing.

The Court: At the time of what hearing?

The Witness: My appearance before him.

The Court: On your last appeal?

The Witness: At my last appeal. I only had a hearing once before a hearing officer.

Mr. Tietz: I ask that they be marked for identification as Defendant's Exhibits A and B.

The Court: They will be so marked.

Q. (By Mr. Tietz): You have stated that you showed them or offered them to Mr. Freedman at the time of the hearing you had before him as the hearing officer of the Department of Justice?

A. Yes. I should say at this time those are copies of the ones I gave to him.

Q. Are they identical copies?

(Testimony of Charles William Affeldt, Jr.)

A. They are identical copies, except the ones I gave Mr. Freedman were notarized by a public notary.

Q. Have you examined your Selective Service file? A. Yes, I have.

Q. Have you found the originals of these duplicates in the file? A. No, I have not.

Q. When you gave them to Mr. Freedman, you gave them [16] to him for what purpose or with what understanding?

A. I gave them to him so that he would—as additional evidence that I was a minister and also a conscientious objector. I thought that perhaps it would serve to refute any adverse testimony he had concerning me.

Q. When you were before this hearing officer on this single occasion that you were before him did you attempt to give him any evidence or argument on the difference between the pacifist and the Jehovah Witness type of conscientious objector?

A. Yes, I did.

Q. What occurred?

A. He refused that evidence. He said, "I have read everything of Jehovah's Witnesses. I don't need to read anything more." And he didn't even look at what I had. He just cut me off.

Q. Did he say anything about "20 clients," some expression like that?

A. Yes, he did. He said he didn't have time to go over my case and take up so much time because

(Testimony of Charles William Affeldt, Jr.)
he had 20 or so more clients he had to see that same day.

Q. Now I am going to direct your attention to another occasion, March the 4, 1952, and ask you if you remember where you were then?

A. March 20? [17]

Q. March 4, 1952. Well, I will add to that question: Isn't it a fact that you were before the Local Board for your personal appearance hearing on that date?

A. Yes, sir. I can't remember the exact date but I was at about that time.

Q. Have you seen the summary which is page 59 of this file? Page 59 of the Exhibit I is the summary or purports to be the summary of your personal appearance hearing.

A. Yes, I have read my entire file. I have read it.

Mr. Tietz: Called "Minutes of Local Board Meeting": your Honor.

Q. It states "Registrant appeared before the Board requesting a IV-D classification. After being questioned he states he is not an ordained minister."

What took place at the board hearing with respect to that particular thing?

A. Well, they asked me whether I had ever attended a theological seminary or a school, a divinity school. I replied that, while I had not attended a college to prepare myself for the ministry, I had studied at congregational meetings of Jehovah's

(Testimony of Charles William Affeldt, Jr.)

Witnesses, and one of the classes is the Theocratic Ministry class for Jehovah's Witnesses, where they are instructed for the ministry.

And they stated that because I had not gone to college [18] and received a diploma, I could not be an ordained minister.

And then I pointed out the regulations provide that a regular minister of religion whose customary vocation was ministering should be exempted or given a IV-D classification.

Q. Were you at that time an ordained minister?

A. All Jehovah's Witnesses consider themselves ordained when they are baptized or when they receive water immersion.

Q. Did you make that statement or submit any other evidence to your Local Board at that time?

A. I made that statement to my Local Board at that time. I can't recall whether I gave him any written information at that time, although I know in my file I have submitted that information.

Q. And you have submitted to them other information showing the meetings you have held, you have conducted, leaflets, handbills with your name imprinted thereon, the subject of your sermons, and so on? A. Yes, sir.

Mr. Tietz: You may cross-examine.

Cross-Examination

By Mr. Real:

Q. Mr. Affeldt, subsequent to your personal appearance hearing did you submit some new evidence

(Testimony of Charles William Affeldt, Jr.)
to the appeal board in writing?

A. Yes, I did. That was after, shortly afterward I [19] obtained that permission from the Local Board, which they granted, I came in a few days later, at the time I gave my local file to the appeal board and submitted that evidence at that time.

Q. In that evidence did you set forth all that you just testified to as to your beliefs as to why Jehovah's Witnesses are ordained ministers?

A. Well, I wouldn't say "all." I submitted additional evidence. I had already submitted much evidence, both oral and written evidence, to the board.

Q. No written evidence was refused you, is that correct? A. That is correct.

Mr. Real: That is all, your Honor.

Mr. Tietz: That is all from this witness.

The Court: You may step down.

Mr. Tietz: Mr. Real, may we have some kind of a stipulation that we will make about the FBI reports?

Mr. Real: Yes. If Mr. Carson will take the stand, I will make the stipulation.

CRAWFORD H. CARSON

called as a witness, being first sworn, was examined and testified as follows.

The Clerk: Will you state your name, please?

The Witness: Crawford H. Carson. [20]

(Testimony of Crawford H. Carson.)

Mr. Tietz: What can we stipulate to, Mr. Real, with respect to the FBI report?

Mr. Real: Your Honor, prior to our stipulation, I think that these documents should be marked for identification and then the foundation laid to our stipulation. We will stipulate as to the process your Honor indicated this morning, which seems to carry on the argument.

The Court: Proceed.

Mr. Real: May it be stipulated that, one, Defendant's Exhibits—and Mr. Carson has four——

The Court: Is the Government now offering for stipulation?

Mr. Real: No, I am not.

The Court: Are you offering to make a stipulation?

Mr. Real: I will as soon as Mr. Tietz lays his foundation, your Honor. My stipulation does not cover that.

The Court: What foundation do you wish laid?

Mr. Real: As to the identification of those particular documents, and we will proceed from there.

Examination

By the Court:

Q. What is your occupation, Mr. Carson?

A. I am special agent in charge of the Federal Bureau of Investigation, Los Angeles Division.

Q. Do you have with you the copies of the investigative report or reports of the Federal Bureau of Investigation [21] respecting the conscientious

(Testimony of Crawford H. Carson.)

objector claims of the defendant here, Charles William Affeldt, Jr.? A. I do, your Honor.

Q. Does that report consist of one or more parts? A. Four reports, your Honor.

Q. For the purposes of identification will you give the date of each report?

A. Yes, sir. One report is dated July 2nd, 1952; another report has the same date, July 2nd, 1952.

Q. Can you otherwise identify them so we may distinguish them, so we can differentiate one from the other? Is one so many pages and the other so few?

A. I would not know, your Honor, without breaking the seal and examining them.

Q. Very well, proceed.

A. And the third is dated July 4, 1952; and the last one is dated July 9, 1952.

The Court: Very well. Will you hand to the clerk the first report which you identify as being dated July 2nd, 1952? You may deliver those reports, under seal, if so advised.

Mr. Clerk, you will mark that report Exhibit C for identification, Defendant's Exhibit C for identification.

The Clerk: Yes, your Honor, C for identification.

The Court: The other report dated July 2, 1952, will [22] be marked Defendant's Exhibit D for identification; the report of July 4, 1952, will be marked Defendant's Exhibit E for identification.

What is the date of the last?

(Testimony of Crawford H. Carson.)

The Witness: July 9th, 1952.

The Court: That will be marked Defendant's Exhibit F for identification. Have you delivered those to the clerk, under seal, Mr. Carson?

The Witness: Yes, your Honor.

The Court: Very well. They will remain under seal pending in camera examination by the court.

Does the Government have a stipulation to offer?

Mr. Real: Yes, your Honor. The Government will offer the stipulation.

May it be stipulated that Defendant's Exhibits C, D, E, and F for identification are true and accurate copies of the complete investigative reports made by the Federal Bureau of Investigation of the conscientious objector claims of the defendant, Charles William Affeldt, Jr.?

Two. Defendant's Exhibits C, D, E, and F were forwarded by the representative of the Federal Bureau of Investigation, so designated, for the purpose, to the office of the United States Attorney?

Three. Defendant's Exhibits C, D, E, and F were forwarded by the office of the United States Attorney to the Hearing [23] Officer designated by the Department of Justice to hear the conscientious objector claims of the defendant, Charles William Affeldt, Jr., as provided in Section 6(j) of the Universal Military Training and Service Act and Selective Service Regulation 1626.25?

Four. Defendant's Exhibits C, D, E, and F are the investigative reports that were in the possession

of the Hearing Officer prior to the hearing held to determine the validity of the conscientious objector claims of the defendant, Charles William Affeldt, Jr., and were used and referred to by the Hearing Officer in the recommendation he prepared and sent to the Department of Justice concerning conscientious objector claims of the defendant, Charles William Affeldt, Jr., as provided in Section 6 (j) of the Universal Military Training and Service Act and Selective Service Regulation 1626.25?

The Court: Do you accept the stipulation?

Mr. Tietz: We accept the stipulation. We would like to have the opportunity to examine the investigative reports of the Federal Bureau of Investigation.

Mr. Real: Your Honor, that is objected to under the privilege of Executive Order 3229.

The Court: That motion will be denied. The defendant wishes to offer the documents in evidence. The court will make an in camera examination of them.

Mr. Tietz: Yes. That is our next request. [24]

Mr. Real: Your Honor, to that request the Government will object upon the grounds there has been no foundation laid as to the relevancy and materiality of these records in this particular case, since there was no showing of a request by the defendant or that he even—well, there is no foundation at all as to the reports by the defendant, as to a request by him as required under the notice of hearing.

Mr. Tietz: First, we would like to be in a position to avail ourselves of the Nugent case and the possible affirmance by the Supreme Court.

And second, I have three other points that I would like to submit to the court.

The Court: Very well. Have you any other questions of Mr. Carson?

Mr. Tietz: None.

Mr. Real: None by the Government, your Honor.

The Court: You may step down, Mr. Carson.

Mr. Carson: Thank you, your Honor.

The Court: I take it that the defendant is not offering Exhibits C, D, E, and F for the purpose of showing that the hearing officer withheld any unfavorable information from this defendant.

Mr. Tietz: Yes, that is one of the points that, regardless of any request, it must be offered to him. I merely state it.

The Court: You are relying upon the Nugent case in that [25] regard?

Mr. Tietz: Yes.

The Court: When you referred to the Nugent case do you have that citation so the record will correctly reflect it?

Mr. Tietz: 200.

The Court: 200 Fed. 2d, 46. Has a writ of certiorari ever been granted in that case?

Mr. Tietz: I don't think so.

(Argument omitted from transcript.)

The next point we wish to make in connection with the FBI report is that the use of it—and, of course, the hearing officer's report and the Attorney General's letter show that it was used—vitiates all further proceedings because it is hearsay; that the

defendant has had no opportunity to exclude or confront and so on.

And the final point in connection with the FBI type of situation is this: It is a further denial of due process if it contains material adverse to the registrant. That is on the presumption that it is definitely, then, prejudicial to him.

Now to proceed with our other points, we, of course, first, wish all six of the points that were made at the close of the Government's case.

The Court: Let us dispose of this evidence now, first. Have you said all you wish to say in favor of your motion [26] that Defendant's Exhibits C, D, E, and F be received into evidence?

Mr. Tietz: Yes, sir.

The Court: Very well. Before ruling on it, the court will make an in camera examination of those documents.

We will take the afternoon recess at this time.

(Short recess.)

The Court: Has the Government stated its objection to the offer of Exhibits C, D, E, and F in evidence?

Mr. Real: Yes, your Honor. For the record, I will state it that there is no proper foundation laid in that these reports, at this point of the trial, are irrelevant and immaterial to the issues in this case.

The Court: Do you make any claim of privilege?

Mr. Real: Also the claim of privilege under 3229, your Honor. I think we made that prior.

The Court: It can always be waived. I do not

know but you may have concluded since then to waive it.

Mr. Real: No, your Honor, we have not.

The Court: Some of the questions that have been asked by Government counsel in some of these cases come perilously close to a waiver, in my opinion.

I have always contended, Mr. Tietz, in the reasoning of United States vs. Nugent, 200 Fed. 2d 46. But I no longer need to do so in view of the holding of the Court of Appeals [27] of this Circuit on February 24th last in Elder vs. United States of America. (202 F. 2d 465.) I believe you were counsel in that case.

Mr. Tietz: I think that is obiter, your Honor, but still it is an expression.

The Court: Yes. And it is such an elaborate treatment of the point as a point in the case.

Having considered the point as being in the case and then having decided it, it seems to me it would be a holding. In any event, I would follow it. I think the reasoning is much to be preferred, as well as the results are much to be preferred, to that in the Nugent.

As I view the matter, there is no question of constitutional due process involved at all. There is no question of even statutory due process. The statute directed the Department of Justice to make inquiry and hold a hearing, and the inquiry, in my view, would be what we call the FBI reports, Exhibits C, D, E, and F here.

In my view, there is nothing in the Constitution or in the statute that requires the Department of Justice, in making its advisory recommendation to

the appeal board, to disclose the results of its inquiry to anyone. But the Attorney General has seen fit to combine the inquiry with the hearing apparently and has directed that the results of the inquiry be turned over to the hearing officer for use by [28] the hearing officer and, in the exercise of his discretion, the Attorney General has set up what I will call some administrative machinery, giving rise to some administrative due process that, briefly, is set forth in Exhibit 2 here. It permits the registrant to request of the hearing officer a general statement, at least, as to the adverse evidence in the hearing officer's possession in order to give the registrant an opportunity to meet it.

Well, that administrative due process is not violated here. So we come down to whether or not these exhibits are relevant or material to any issue in the case for use by the defense, and the court finds that the exhibits are not relevant or material to any issue appearing in this case.

The exhibits will not be submitted for inspection by the defendant or his counsel by reason of the court's ruling and by reason of the fact that, in the opinion of the court, the public's interest in the preservation of the confidential character of these executive documents outweigh the possible evidentiary value of Exhibits C, D, E, and F for identification to the defense in this case.

Accordingly, the clerk will reseal Exhibits C, D, E, and F for identification and keep them in his custody, under seal, pending further order of the court.

The court will make the further order in this case, as has been made in other cases, that in the event of any appeal [29] in this case the clerk will, upon request of the defendant, consider Defendant's Exhibits C, D, E, and F as part of the record on appeal and will transmit the exhibits, under seal, to the Appellate Court for in camera examination by the Appellate Court in order for the court to examine the documents and determine whether or not this court erred in, one, withholding the documents from the inspection by the defendant and his counsel; and, two, by excluding them from evidence in the case.

It will be necessary to declare a recess. Pardon me.

Mr. Tietz: I might ask your Honor would we have 15 minutes. I have a matter I would like to bring to Judge Westover's attention and it would take perhaps that long. Mr. Real's presence will be required there, too.

The Court: Very well. Perhaps we may have to hold late in order to finish this Sterrett case this afternoon, but you may have the 15 minutes.

Court will recess for 15 minutes.

Mr. Real: Before you leave the bench, your Honor, may Mr. Carson be excused at this time? I do not think his presence will be necessary in the next case.

Mr. Tietz: That is correct.

The Court: Very well.

(Short recess.)

The Court: In the case on trial, gentlemen, is it [30] stipulated that the defendant Affeldt is present?

Mr. Tietz: So stipulated.

Mr. Real: So stipulated, your Honor.

Mr. Tietz: In connection with the renewal of my argument——

The Court: Now, just a moment. Has the defendant rested now?

Mr. Tietz: Yes, sir.

The Court: Is there any rebuttal?

Mr. Real: No rebuttal, your Honor, at this time.

The Court: Both sides rest. And the defendant, I take it, now renews his motion for judgment of acquittal?

Mr. Tietz: Yes, sir.

The Court: And upon the grounds previously stated.

Mr. Tietz: Other than the three FBI points that I stated before, that there has to be a disclosure whether or not there is a request before the hearing. I would like to discuss that for a few minutes.

(Argument omitted from transcript.)

Mr. Tietz: There are some points that have come up through the testimony of the defendant. One is that the summary of his personal appearance before the Local Board, which is page 59, is defective. They call it "Minutes of Local Board Meeting," but it, of course, means the same thing. Probably they term it "Minutes" because that is really what it is. [31] It is more of a minute action than it is a summary.

He has pointed out that there were things that he brought up during that personal appearance hearing that were not set forth in the minutes, or, as it should be called, summary, particularly about his ordination and particularly about his work.

(Further argument omitted.)

There is another point, too, that I should state, although I do not think your Honor will want me to do more than state it; and that is, that it shows that they used an illegal basis; they had misunderstanding of the regulations. They thought that only an ordained minister could qualify. In their last paragraph they say: Since the registrant is not an ordained minister the board members felt that a IV-D classification was not warranted.

I have only this comment to make on that.

(Argument omitted from transcript.)

Now I would like to go on—I have one thing to say, though, about a point that I made in my first motion, just an additional brief statement, and that is that he was not a registrant of the board. It may seem that he conferred jurisdiction, and my argument is—and it is just really a statement—that an individual can't confer jurisdiction on a local draft board any more than individuals can confer jurisdition on a court. [32]

(Argument omitted.)

Now, my other new point that came out from the evidence is: At the hearing officer hearing, irrespective of anything to do with the FBI investiga-

tive report, about certain aspects that were a denial of due process. The fact that the hearing officer, undisputedly, refused to accept evidence of the differences between a pacifist and J. W. type of conscientious objector is one point. The fact that the hearing officer refused to accept some written evidence, two affidavits, is another point.

(Argument omitted.)

The Court: I notice that Defendant's Exhibits A and B for identification, the documents which the defendant states he offered to the hearing officer and which were refused, are not in evidence. Do you wish to offer them in evidence?

Mr. Tietz: Oh, yes, I thought we had.

Mr. Real: Your Honor, we will object to them on the grounds that they are irrelevant and immaterial to this case. They are hearsay and they are not the best evidence, your Honor, since the defendant on the stand testified that he gave the originals, notarized copies, to the hearing officer and there has been no showing that those are not available.

Mr. Tietz: The regulation requires that all written evidence submitted be put in the file, and the file speaks for itself, but those are not there. [33]

The Court: The regulation does not require the hearing officer to put evidence submitted to him in the file.

Mr. Tietz: It does not specifically say who, and it certainly does not name him, but he is part of this procedure. They were given to him for the one purpose.

The Court: If the regulation required that all evidence submitted to the hearing officer be put in the file, then the rule of the Nugent case would be clear, would it not, because the FBI report is part of the evidence under the machinery set up by the Attorney General before the hearing officer.

Mr. Tietz: There, of course, is a distinction. The FBI is protected by the Attorney General's order, perhaps, where there is no claim of protection here.

The Court: I should not think it would be protected if the regulations provide any evidence that went to the hearing officer should be placed in the registrant's file. But I do not understand the regulations require it. It is only the evidence which is presented to a local board, as I understand it, which must go into the file.

Is that the Government's understanding?

Mr. Real: That is my understanding.

Mr. Tietz: Those two exhibits should be in as showing that this defendant did not have a fair hearing before the hearing officer because they were not considered by the [34] Attorney General who was to pass on what the hearing officer had considered.

Mr. Real: I submit, your Honor, that those exhibits are questions involving the ministerial claim which the Attorney General has no jurisdiction to rule upon.

The Court: They are offered here as evidence of material which was offered to the hearing officer and refused by the hearing officer. The question is upon the admissibility. I think your objection is

technically good, that these are not the originals. Do you wish to stand upon that?

Mr. Real: We will stand on the objection that they are irrelevant and immaterial, and also that they are not the best evidence, your Honor.

The Court: Did the defendant testify that these were the documents which were offered?

Mr. Tietz: That those were true copies of the ones that were submitted.

The Court: What became of the originals? Did he testify?

Mr. Tietz: No; that he gave them to Mr. Freedman. Yes, sir. But what eventually became of them he does not know.

The Court: If that is the state of the record, of course, that is apropos the admissibility of them. But if that is the state of the record, who can say that Mr. Freedman did not use them or did not consider them? [35]

Mr. Tietz: My argument is that they should have put in the file for the use of the appeal board.

The Court: The evidence will be reopened on the motion of the defendant and the objection to receipt in evidence of Exhibits A and B for identification will be overruled and the exhibits will be received into evidence.

Is there any further evidence to be offered now?

Mr. Tietz: None.

Mr. Real: Not on the part of the Government.

The Court: The evidence is again closed. Anything further?

Mr. Real: Nothing further, your Honor, from the Government.

The Court: I would like to read this file carefuly, gentlemen, looking toward the question of whether or not there appears to be a basis in fact for such a drastic change in the classification.

Mr. Tietz: If I may have a minute, your Honor, I can bring something to the court's attention that may be of some aid in why the refusal of the defendant to return that Form 150 that was sent him on that date.

Mr. Real: Your Honor, we will object to that.

The Court: As I view that, Mr. Tietz, it is this: That revised form was merely a privilege offered to this registrant. If he did not choose to take advantage of it he [36] was not required to do so. If he were content to stand upon the record as it then was, he was entitled to do it, as I view it.

Mr. Tietz: I have just about a 30-second statement of fact that may help the court.

The Court: Is it in the record?

Mr. Tietz: In that sense that you have the old form and you have the new form it is in the record.

(Argument omitted.)

The Court: Is there any objection to continuing this case until March 19th at 10:00 o'clock?

Mr. Tietz: None on the part of the defendant.

Mr. Real: None from the Government, your Honor.

The Court: Very well. I will continue it for further oral argument until that time. In the meantime I would like to read the file.

You are excused at this time, Mr. Affeldt, and instructed to return to this courtroom on Thursday morning, March 19th next, at 10:00 o'clock.

(Whereupon a recess was taken until 10:00 o'clock a.m., Thursday, March 19, 1953.) [37]

Thursday, March 19, 1953, 10:00 A.M.

The Court: No. 22,595, United States vs. Affeldt.

Mr. Tietz: Ready for the defendant.

Mr. Real: Ready for the Government, your Honor. The defendant is present.

The Court: What is the present status of this case?

Mr. Real: My recollection of it is, your Honor, it is really here for argument on the submitted motion for judgment of acquittal.

The Court: Do you agree that that is the present status of the affeldt case?

Mr. Tietz: Yes, your Honor.

The Court: While I have it in mind, Mr. Tietz, I shall expect the Government to have in court at all times all applicable regulations in these cases. I find that my copies are not always up to the minute.

Mr. Real: Yes, your Honor.

The Court: Here this defendant was classified I-A after having been classified a I-O.

Mr. Tietz: And III-A, too, your Honor.

The Court: Yes, I have in mind that dependency question. I am just referring now to the conscientious objector claim. Do you wish to argue this matter?

(Argument omitted from transcript.) [38]

The Court: It is after 12:00 now. Perhaps we had better take this up again at 1:30. Is that agreeable?

Mr. Tietz: Yes, sir.

The Court: Very well. The defendant will return at 1:30 this afternoon.

(Whereupon a recess was taken until 1:30 o'clock p.m. of the same day.) [39]

Thursday, March 19, 1953, 1:30 P.M.

The Court: In the case on trial, No. 22595, United States vs. Affeldt, is it stipulated, gentlemen, that the defendant is present?

Mr. Tietz: So stipulated.

Mr. Real: So stipulated, your Honor.

The Court: Any further argument on behalf of the defendant?

Mr. Tietz: Yes, your Honor. Before proceeding with the argument I have a request to make.

The defendant is apprehensive that in his testimony he did not bring out a point that would bring him within one of the FBI points, although perhaps not the Nugent point. I would therefore like permission to open the evidence for a few minutes to question him on that one point.

The Court: Is there objection?

Mr. Real: No objection, your Honor.

The Court: Motion granted.

CHARLES WILLIAM AFFELDT, JR.
(Recalled)

Further Direct Examination

By Mr. Tietz:

Q. Mr. Affeldt, I am directing your attention to the occasion you were before the hearing officer of the Department of Justice. Did you have any conversation with him with [40] respect to the FBI investigative report? A. Yes, I did.

Q. What was it?

A. Well, near the close of the hearing he asked me why I brought along a fellow, Mr. Bill Dragle, and I replied that he knew me, knew I was one of God's witnesses, he knew I was a minister and knew my character. So I brought him along so that he could refute anything they might have against me relating to my character, my beliefs, and my ministerial activities.

Q. When you say "against you," did you have reference to mimeographed copies that he sent you that he would advise you of any adverse information? A. Yes, I did.

The Court: Are you referring to Exhibit 2 in evidence here?

The Witness: Yes, instructions, the instructions contained with the notice to report for the hearing.

Q. (By Mr. Tietz): Did he show you the FBI report? A. No, he did not.

Q. Did he inform you that some of the informants in the FBI investigative report had, as is

(Testimony of Charles William Affeldt, Jr.)

stated on page 71 of Exhibit A, that being the letter the special assistant of the Attorney General sent to the appeal board, that several of the persons, however, had never heard registrant discuss [41] his religious beliefs or opposition to military service?

A. No, he didn't. At the time I asked him about that, he said he had nothing against my character, as far as my former employees and all my associates had testified that my character was above reproach.

Mr. Tietz: You may cross-examine.

The Court: Did you consider it against your character the statement that you had not discussed your religious beliefs with everyone?

The Witness: I would not consider it against my character, no. But the appeal board might consider that as evidence of not being sincere.

The Court: The Attorney General's letter, page 71, letter to the appeal board, states that:

> "acquaintances, former employees and associates, all describe registrant as sincere in his religious beliefs and state that his character and reputation are above reproach."

Any cross-examination?

Mr. Real: No cross-examination, your Honor.

The Court: You may step down.

Mr. Tietz: That is all. In connection with that, your Honor, I forget whether or not we asked that the investigative report be admitted in evidence. Does the Government have any recollection on that? We had some stipulation. [42]

Mr. Real: Yes, it was asked and the Government's objection was sustained in that connection, your Honor.

The Court: The investigative report—there were several reports, four of them exactly—Defendant's Exhibits C, D, E, and F for identification are now in custody of the clerk, under seal, and were examined in camera by the court and objection to their offer in evidence was sustained.

Mr. Tietz: And counsel is refused permission to go over these reports; is that contained in the ruling of the court?

The Court: Yes. The court ordered them sealed and thus withheld from the defendant and his counsel, upon the ground that the public policy favoring the preservation of the confidential character of executive documents such as these outweighs any possible evidentiary value to the defense of the documents in question. And, of course, the reports will be available in the event appeal be taken, to be included, under seal, in any record on appeal, so that the Appellate Court may examine them and make such ruling as it deems proper.

Mr. Tietz: There are so many cases we have been trying consecutively I was not certain that I had protected the record on that point.

Now, your Honor, I would like to go on with my argument for a motion for judgment of acquittal. [43]

Mr. Real: Your Honor, I do not want to interrupt Mr. Tietz, but may we close the evidence before we go on?

Mr. Tietz: Yes. I am sorry. We rest.

Mr. Real: The government rests.

The Court: Very well. You renew your motion for judgment of acquittal upon the grounds heretofore stated?

Mr. Tietz: All stated, and then the new ones that I wish to go on with now. The first new one is that the Attorney General, as is shown by page 71 of Exhibit 1, in his letter of recommendation to the Appeal Board shows a misconception of the law.

The Court: Before you proceed.

(Discussion of proceedings in Sterrett case omitted from transcript.)

Mr. Tietz: On page 71 it is quite evident that the Attorney General is under misapprehension concerning the Act and the regulations and the definition of a conscientious objector. The Attorney General is under the rather prevelant misconception that in order for an individual to be a conscientious objector he must also be a pacifist.

(Argument omitted from transcript.)

The testimony of the defendant, both the other day and today, goes to show certain things that I assert was denial of due process. On page 59 we see the summary of the personal appearance hearing, and I am going to argue that this summary [44] does not contain a true summary of what took place; that it left out essential things, and therefore the appeal board did not have before it things

which might have made it different, particularly on his claim for being a minister entitled to IV-D classification. That his testimony was that when it says in the summary that "he admitted," or whatever it says there, about not being ordained, that is incorrect. He told them he was ordained. That is one point.

Now, the second point is that he gave them the explanation that he was a regular minister, which the summary does not contain.

(Argument omitted.)

Now I want to go on to the next point and that is what occurred at the hearing officer's hearing. I submit there are sufficient irregularities there to justify the conclusion that there was a denial of due process.

First, that the hearing officer also refused to accept evidence of the differences between a pacifist and the J. W. type of conscientious objector, and when the defendant attempted to go into that, according to his testimony, he was told by the hearing officer that he had 20 other clients to see that day and he could not give him any more time. He wanted only yes or no answers. I believe that was the expression used by the witness.

Further, that the hearing officer failed to transmit to [45] the Attorney General for the consideration of the appeal board the two affidavits that were submitted by the registrant and which I believe contained some information that was not in the file.

The Court: Was it admitted that the hearing officer took the affidavits, even though they are not in the file?

Mr. Tietz: The defendant states to me that he did take them. He said he testified to that. I don't remember the testimony.

The Court: Yes, that is my recollection of the defendant's testimony. So the only objection, I take it, is that they are not in that file.

Mr. Tietz: Yes, that the Attorney General and the Appeal Board did not have them before them when they considered the matter.

The Court: Does the Government wish to be heard?

Mr. Real: Not unless your Honor has some particular things. Your Honor has heard the argument of the Government in this case. I think there are no new points raised in this particular case.

The Court: I have already indicated my views as to the point made with respect to the dependency classification. It is my opinion that the new dependency questionnaire which was submitted to the Local Board in September of 1951, reducing the claimed dependents of the defendant from [46] three to one—in the original questionnaire the defendant had claimed as dependents his mother, his sister, and his father—in the revised questionnaire, the new questionnaire furnished in September, 1951, only the mother is claimed as a dependent.

In my opinion, that furnished sufficient informa-

tion for the board to use as a predicate for the withdrawal of the dependency exemption.

The next point is as to these exhibits A and B which the defendant states he presented to the hearing officer and the hearing officer declined to put them in the file. Of course, insofar as the exhibits deal with the claims of defendant for the classification of IV-D as a minister, that issue is not before the hearing officer, and if that were all that were involved in the exhibits, the hearing officer could have rejected them upon that ground.

However, Exhibits A and B do deal with the conscientious objector claims of the defendant and contain some information relative to his claim. The defendant testified that the hearing officer took the exhibits and presumably considered them, so that the force of the objection is narrowed to the fact that the exhibits are not in the file, the Selective Service File, and consequently not before the appeal board. Section 1621.8 to the regulations provide, in part, that

"Every paper pertaining to the registrant, except his [47] registration card (SSS Form No. 1) and such other papers and documents as may be designated by the Director of Selective Service shall be filed in his Cover Sheet (SSS Form No. 101) until authorization to remove it has been received from the Director of Selective Service."

At the time pertinent here, Section 1626.25(d) provided, in part, that

"The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant both the

letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice."

That has since been amended, has it not?

Mr. Tietz: Yes, sir.

The Court: So the report of the hearing officer was not required to be in the file at the applicable time here, is that correct?

Mr. Tietz: That is true.

The Court: There is nothing in the statute or the regulations that I find which requires that these papers, such as these affidavits or exhibits A and B, be considered as presented to the hearing officer are required placed in the file. The Department of Justice is directed by the statute to conduct an inquiry and hearing. The evidence received [48] by the hearing officer at the hearing is not required nor even expressly permitted to be placed in the file. The defendant could have presented this information at his personal appearance under Section 1624.2(d), and if so presented, the information would have been placed in his file pursuant to Section 1621.8, etc., of the regulations.

There is nothing, in short, to prevent a defendant from placing Exhibits A and B in his file if he so desired. In any event, there is nothing in these exhibits which is not already included in the file in substance. In my opinion, its omission, even if erroneous, was not such as to prejudice any right of the defendant. It must be construed as harmless error in effect under the ruling in the Tyrrell v. United States.

The report of the hearing officer is missing from the file, but in view of the amendment of the regulations which the defendant has called to my attention, there is nothing to be made of that fact.

Finally, we come to the more difficult question of whether or not there is a basis in fact for the denial of the conscientious objector claims of the defendant—more correctly, whether there is basis in fact for the classification I-A in which the defendant has been placed.

As the letter of the special assistant to the Attorney General, appearing at pages 71 and 72 of the Selective [49] Service file, Exhibit 1, points out, the defendant on his Special Form for Conscientious Objector, at page 18 of Exhibit 1, in response to question 5, reading:

> "Under what circumstances, if any, do you believe in the use of force?"

has answered:

> "Only in a case of self-defense or for the protection of my dear relatives and brethren in the truth as provided in the Holy Scriptures."

So that statement and other material appearing in the file, in my opinion, gives reasonable basis in fact for the classification I-A.

That conclusion is reached through the further conclusion that the defendant must be "guilty" as charged and is so found.

Is there any occasion to order a presentence investigation?

Mr. Tietz: Your Honor, before we get to that, I might remind your Honor that we raise the question here about jurisdiction. I believe the file and the records in this case will show that there is no proof of jurisdiction. I am sure your Honor forgot that.

The Court: The point there, as I understand it, is that the defendant was registered by the registrar of one board.

Mr. Real: No, your Honor. It is that he failed to sign the registration card. [50]

The Court: Oh, this is the case where he failed to sign the registration card?

Mr. Real: Yes, your Honor.

Mr. Tietz: And there is no further testimony that he ever was a registrant of that board. Remember, this is a case that does not have that stipulation.

The Court: I understand. I recall it now. But he did sign his registration statement, his classification questionnaire. He signed and presented very many matters. He considered himself a registrant of the board.

Mr. Tietz: My argument was, like someone comes into court and attempts to confer jurisdiction on the court.

The Court: Well, he cannot confer it where none exists. But there is no question but what he lives within the jurisdiction of Local Board 81, is there?

Mr. Tietz: Why not? Is there any testimony that he did?

The Court: Well, let's see. He gave us his address. I do not know what the jurisdiction territorially of Local Board 81 is, but if the Government will give the court judicial knowledge, the court will take judicial notice of it.

Mr. Real: Your Honor can take judicial notice that that address is within the jurisdiction of this particular local board, your Honor.

Mr. Tietz: How?

The Court: It is a matter of public record, is it not, [51] what the jurisdiction of the board is?

Mr. Real: Yes, it is, your Honor.

(Further argument omitted from transcript.)

The Court: If the Government is satisfied to stand on it, in my opinion, it is analagous to a venue question. If there is any point to it at all, it is analagous to a venue question, which was waived by the defendant on submitting his classification questionnaire and subsequent matters to Local Board No. 81 and thus submitting himself to be classified by that board.

Is there any occasion to order a presentence investigation in this case?

Mr. Tietz: I should not think so, your Honor.

The Court: The Government?

Mr. Real: None from the Government.

The Court: The court will direct that no presentence investigation or report be made in this case.

Is March 30th at 10:00 o'clock a satisfactory date for sentence?

Mr. Tietz: Yes.

Mr. Real: Satisfactory to the Government.

The Court: Is the defendant at liberty on bail?

Mr. Tietz: Yes, sir.

Mr. Real: He is.

The Court: The court will continue your bail, Mr. Affeldt, [52] pending sentence. And you are instructed to return here on March 30th next at 10:00 o'clock for sentence.

(Whereupon a continuance was taken until 10:00 o'clock a.m., March 30, 1953.) [53]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings, as specified by defendant's counsel, had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 15th day of July, 1953.

/s/ ALBERT H. BARGION,
Official Reporter.

[Endorsed]: Filed July 16, 1953. [54]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 16, inclusive, contain the original Indictment; Waiver of Trial by Jury and of Special Findings of Fact; Judgment and Commitment; Notice of Appeal; Designation of Record on Appeal and two Orders Extending Time to Docket Appeal and a full, true and correct copy of Minutes of the Court for December 22, 1952, and March 12, and 19 and April 7, 1953, which, together with the original exhibits and reporter's transcript of proceedings on March 12, 1953, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that the fees for certifying and preparing the foregoing record amount to $2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 28th day of July, A.D. 1953.

[Seal] EDMUND L. SMITH,
Clerk

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13,941. United States Court of Appeals for the Ninth Circuit. Charles William Affeldt, Jr., Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed July 29, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 13941

CHARLES WILLIAM AFFELDT, JR.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

I.

Reclassification of appellant in Class I-A was arbitrary and without basis in fact.

II.

Reclassification was motivated by and was based on misconceptions of law on the local board level and on the appeal board level.

III.

Appellant was denied due process of law in connection with his personal appearance hearing before the local board, on each of the following grounds:

First: the summary of the hearing was prejudicially incomplete.

Second: the summary shows that the board's decision was made on an illegal basis.

IV.

The Hearing Officer deprived appellant of due process of law in the following particulars each vitiating the usefulness of his report and tainting the further classification action:

First: the said officer based his Advisory Opinion and the Attorney General based his recommendation on illegal bases.

Second: the said officer in his Opinion, used adverse material against appellant, although he had led appellant to believe there was no adverse material.

Third: the said opinion was prejudicially incomplete.

Fourth: he refused to accept evidence from appellant of the difference between the Jehovah witness and the pacifist types of conscientious objectors.

Fifth: he failed to transmit to the local board or to the appeal board two affidavits submitted to him by appellant.

Sixth: he improperly hurried appellant during the hearing.

Seventh: he did not show appellant the FBI investigative reports.

V.

Appellant was never a registrant of the local board that issued the order on which the indictment is based, or a registrant of any local board.

VI.

The failure and refusal to provide appellant with the secret FBI report was a violation of the Act, the Regulations, and the due process clause of the Fifth Amendment.

/s/ J. B. TIETZ.

[Endorsed]: Filed September 9, 1953.

[Title of Court of Appeals and Cause.]

ADOPTION OF DESIGNATION

Appellant hereby adopts the Designation of Record heretofore filed in the District Court.

/s/ J. B. TIETZ.

[Endorsed]: Filed September 9, 1953.

No. 13941

United States Court of Appeals

FOR THE NINTH CIRCUIT.

CHARLES WILLIAM AFFELDT, JR.

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

HAYDEN C. COVINGTON

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No. 13941

United States Court of Appeals

FOR THE NINTH CIRCUIT.

CHARLES WILLIAM AFFELDT, JR.

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

JURISDICTION

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Southern District of California, Central Division. [4-6][1] The district court made no specific findings of fact. These

[1] **Numbers appearing in "brackets" herein refer to pages of the printed Transcript of Record filed herein.**

were waived. So were conclusions of law. The trial court stated orally the brief reasons for his decisions. [49-50]

The trial court found the appellant guilty. [49-50] Title 18, Section 3231, United States Code, confers jurisdiction in the district court over the prosecution of this case. The indictment charged an offense against the laws of the United States. [3-4] This Court has jurisdiction of this appeal under Rule 37(a) (1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law. [6-7]

STATEMENT OF THE CASE

The indictment charged appellant with a violation of the Universal Military Training and Service Act. It was alleged that after appellant registered and was classified he was ordered to report for induction. It is then alleged that on or about November 13, 1952, appellant did knowingly fail and refuse "to be inducted into the armed forces of the United States as so notified and ordered to do." [4]

Appellant pleaded not guilty. At the trial he waived the right of trial by jury. Findings of fact and conclusions of law were also waived. [9]

Appellant subpoenaed the production of the secret FBI investigative report made pursuant to Section 6(j) of the act. Evidence was received at the trial. [9-43] Upon the trial the secret FBI investigative report was offered into evidence when produced by the Government. The objection of the Government was sustained after the court examined the FBI report *in camera.* The document was excluded on the grounds that it was privileged and that the confidential privilege of the Attorney General overruled the materiality of the document. [25-32]

A motion for judgment of acquittal was made at the close of all the evidence. [12-18, 45-49] The court denied the motion for judgment of acquittal. [49-50] The court found the appellant guilty. [50] The appellant was sen-

tenced to serve a period of four years in the custody of the Attorney General. [4-6] Notice of appeal was timely filed. [6-7] The transcript of the record (including statement of points relied upon) has been timely filed in this Court.

THE FACTS

Appellant was born on September 11, 1926. (1)[2] He registered with his local board on September 10, 1948. (2) The board sent him a classification questionnaire. He requested additional time in which to fill it out. (3, 16) The questionnaire was filed with the local board on November 18, 1948. (4)

In the questionnaire the appellant gave the board all the information required by law. He showed his name and address. (5) He answered that he was a minister of religion under Series VI. He said that he did regularly serve as a minister. He said that he had been serving as such since September, 1939. He stated that he was not formally ordained, however. (6)

Appellant showed that he was a field clerk for the Southern Counties Gas Company. He said that he earned $1.50 per hour and worked 40 hours per week. (8)

Appellant showed that he was born in Los Angeles on September 11, 1926. He answered that he had been convicted of a felony. He showed that he had been convicted of violating the Selective Training and Service Act of 1940. He showed this conviction occurred in 1945. (9)

The appellant signed Series XIV. Here he certified that he was a conscientious objector. He asked the local board to mail to him the special form for conscientious objector. (10)

The local board mailed to him the special form for conscientious objector. This was filled out by Affeldt and filed with the local board on November 18, 1948. In it he signed

[2] **Numbers appearing in "parentheses" refer to pages of the draft board file. The numbers are written in longhand at the bottom of each page and are circled.**

Series I(B). (17) He stated that he believed in the Supreme Being. He then described the nature of his belief in the Supreme Being. He showed that his obligations to God were higher than any of those that arise from human relations. He then added that under God's law he could not engage in the affairs of this world or participate in wars of this world. He showed that God's law was supreme. He said that if it conflicted with the law of man he must obey God's law, rather than that of man's. (17)

He showed the local board that he had been reared as one of Jehovah's Witnesses by his parents. He showed that he got his conscientious objections from their teaching and from the study of the Bible. (18)

He stated that although he relied upon no particular person for religious guidance, he did depend entirely upon the Bible as his guide. (18) He said that he believed in self-defense. He showed the only time that he believed in the use of force was in self-defense. (18) He answered that he had given public expression to his belief by testifying in federal court in Los Angeles on April 4, 1945, when he was tried and convicted of violating the Selective Training and Service Act of 1940. (18)

Affeldt then listed the schools he had attended, the employers for whom he had worked and the places where he had lived. (18, 23)

Affeldt showed that both of his parents were Jehovah's Witnesses. He answered that he was a member of a religious organization, Jehovah's Witnesses. He showed that the Watchtower Bible and Tract Society was the legal governing body of that group. He said that he had been taught the beliefs of Jehovah's Witnesses since he was a child. He gave the name of his church and its address. He showed that W. J. Drewelow was the presiding minister of the congregation that he attended. (23) He then gave the names of several persons as references. (24)

In the form he referred to an attached booklet entitled "Neutrality" and also he attached to the special form for

conscientious objector a separate letter, written in longhand. (20-22)

In his separate letter he stated that he had grown up in the faith of Jehovah's Witnesses. He showed that he had served the Lord since 1939 as a minister. He said that he had given public evidence of the symbolization of the covenant he had made to serve the Lord. He stated that he had been ordained. He then explained fully about the ways and means that he had been carrying on the preaching work as one of Jehovah's Witnesses. He explained that it was a legal and proper method of preaching. (19-20)

He showed that he had attended the Theocratic Ministry School for his training. He stated that he had never attended a theological seminary, but that his attendance at the Watchtower training school was adequate and sufficient to prepare him for his ministry. (20) He described the classes of instruction that he attended and the time that he spent preparing for his ministry. (21) He again stated that it was wrong and contrary to his belief in the Bible to have any part in the affairs of this world. He said that he could not serve two masters. He chose, therefore, to be a soldier of Christ Jesus and not of this world. He said that Jesus taught brotherly love. Because of his beliefs in the teachings of Jesus and Jehovah, he stated that it was impossible for him to engage in any warfare carried on by the nations of this world. (22)

On November 22, 1948, Affeldt filed a dependency form showing that he had three dependents. (26-27) As a result of this the local board, on November 30, 1948, classified him in Class III-A. (11)

Because of a change in the law and a reduction in the number of his dependents he was taken out of the deferred classification of III-A and placed in I-O on October 23, 1951. (11, 29-32, 33) He was notified of the I-O classification on October 24, 1951. (11) This classification made appellant liable for the performance of civilian work contributing to

the national safety, health and interest in lieu of induction into the armed forces.

After he was ordered to report for his preinduction physical examination he was examined and was found to be acceptable. (11, 34) He requested a personal appearance. (11, 35) The board granted it and fixed the hearing for November 6, 1951. (11, 36)

At the hearing Affeldt appeared. (11, 40) The memorandum showed that Affeldt requested the minister's classification of IV-D. It showed too that he was employed full time with the Southern Counties Gas Company. It recognized his contention that he claimed it to be his vocation. The board found, however, that it did not warrant giving him the IV-D classification. The local board continued the I-O classification. He was notified officially of the classification. (11, 40)

The Gas Company filed a letter requesting reconsideration of his case. The board reconsidered his case. There was no change. (11, 37-38, 43)

Affeldt filed with the local board, on November 15, 1951, a petition signed by twenty people. (11, 45) The petition certified that he was one of Jehovah's Witnesses and actively engaged in preaching. (11, 45) The file was forwarded to the appeal board on November 16, 1951. (11) The appeal board on December 11, 1951, classified him in I-O. This classification, like that given to him by the local board, required him to do civilian work in lieu of induction into the armed forces. (11, 47-47 I) He was notified of this classification. (11, 13)

The local board mailed to appellant on December 13, 1951, a revised form for conscientious objector. (11, 48) He refused to fill out the revised form. He wrote the board a letter and told them that, while he was a conscientious objector, he could not conscientiously fill out the form and sign Series I(B) because it called upon him to agree to doing the alternate civilian work. He said that he was in a

covenant with God and that doing this sort of work could cause him to violate his covenant. (12, 49, 50-53)

The local board then obtained clearance from the armed forces to have him accepted by the army notwithstanding his conviction for violation of the Selective Training and Service Act of 1940. This clearance came through on February 7, 1952. (12, 54) He was given a preinduction physical examination, found acceptable and mailed a notice thereof. (55) On the same date the local board made a memorandum indicating that it was the continuous duty of Affeldt to make out the new form and that since he had refused to do it the local board reopened his case, according to the memorandum. He was classified in I-A because of his refusal to fill out the new form. (56) After he received notice of this he requested a personal appearance on February 27, 1952. (12, 57) The local board fixed the hearing for March 4, 1952. (12, 50)

On March 4, 1952, Affeldt appeared before the local board and testified that he had quit secular work. He said that he was now only working part time at odd jobs. He then added that he was devoting his full time to the ministry. The local board found that, notwithstanding his full-time devotion to the ministry, he was not entitled to the minister's classification because he "is not an ordained minister." (12) The local board continued his I-A classification on March 4, 1952, and notified him on the same day of this action. (12)

Upon receipt of the I-A classification Affeldt wrote a letter appealing his classification. In this letter he stated that the local board, at the personal appearance, demonstrated that it was prejudiced against him and classified him I-A solely because he refused to sign the revised special form for conscientious objector. He again reiterated the facts showing that he was a full-time minister and stated that, nevertheless, he was still a conscientious objector, even if he did not sign the revised form. He then explained fully why he could not sign the form. He showed that he

could not do work as a conscientious objector because he was a minister. He said that he should not have been asked by the local board to agree to do what conflicted with his conscience. (60-61) This letter of appeal was received by the board in time. (12) His file was mailed to the appeal board on March 18, 1952. (12)

The appeal board made a preliminary determination that he was not entitled to the conscientious objector status. Minutes were entered on the back of the questionnaire. (12) His file was forwarded to the Department of Justice. (63)

On June 17, 1952, the local board wrote a letter to the appeal board urging it to make an early determination of his case and hasten the return of the file to the local board because the local board was anxious to induct the registrant. (64) The appeal board wrote back that the file was with the Department of Justice. (65, 65 A) The chairman then replied that the file must be returned to the local board not later than August 28, 1952, in order that the appellant could be inducted before he reached his 26th birthday. (66)

The district attorney wrote the local board that he was heard before the Department of Justice on July 30, 1952, and the file was sent to Washington on that date. (67) The Department of Justice, in response to an inquiry made by the district attorney to hasten the case, stated that Affeldt would be liable until he was 35 years of age because of his deferment on account of dependents. (67, 68)

On August 29, 1952, the local board issued an order for Affeldt to report for induction on September 9, 1952. (13, 69) On the same date it postponed induction to permit the completion of the appeal. (13, 70)

Because Affeldt could not continue in the full-time ministry work he was forced to resume full-time secular work. His employer made an application for deferment because he was devoting 40 hours a week to his work. (13, 73) This request for deferment was denied. (13, 74)

T. Oscar Smith, Special Assistant to the Attorney General, made a report and recommendation to the board of

appeal on September 9, 1952. In his recommendation he recited the hearing before the hearing officer. He found that Affeldt was one of Jehovah's Witnesses and that he based his conscientious objections on the teachings of Jehovah's Witnesses and his personal study. He mentioned that the FBI secret investigative report showed a conviction and incarceration. He then said that the FBI report showed that all informants said Affeldt was sincere. He then added that while he was a sincere conscientious objector he would use force in self-defense and for the protection of his relatives and others of Jehovah's Witnesses.

The Special Assistant to the Attorney General referred to the fact that the hearing officer examined Affeldt closely on his belief in self-defense. He found that Affeldt told the hearing officer he would defend his brothers to the extent necessary under the circumstances. The Special Assistant to the Attorney General referred to the fact that Affeldt said he was not a pacifist. It was then concluded by the Attorney General that Affeldt was not entitled to the conscientious objector status because, since he was not a pacifist, he "is not opposed to war in all its forms, but rather will fight in the defense of brethren." He said that the appellant was not entitled to the conscientious objector classification. He recommended that the claim be not sustained. (71-72) This report was returned to the appeal board. On September 25, 1952, the appeal board classified appellant in Class I-A. (76 I) The file was returned to the local board and on October 2, 1952, he was notified of this classification. (13, 77)

Affeldt, on October 17, 1952, was ordered to report for induction on November 13, 1952. (13, 78) On November 7, 1952, he appeared before the local board and informed the board that he would not report for induction. He said that his religion prohibited him from bearing arms against another. He indicated that he would take conscientious objector work providing he had week ends open for preaching.

On November 13, 1952, he reported at the induction station and refused to submit to induction. (84, 85)

QUESTIONS PRESENTED AND HOW RAISED

I.

The undisputed evidence showed that appellant possessed conscientious objection to participation to both combatant and noncombatant military service. He showed that these objections were based upon his sincere belief in the Supreme Being. He showed that his obligations to the Supreme Being were superior to those owed to the state. He showed that his beliefs were not the result of political, philosophical, or sociological views, but that they were based solely on the Word of God. (17-24)

He attached documents to his conscientious objector papers showing fully his views.

The local board granted the conscientious objector status. He was placed in Class I-O. (11) After a personal appearance his conscientious objector status was continued. (11, 33) On appeal the appeal board continued appellant in Class I-O, on December 11, 1951. (11, 47 I) On February 19, 1952, the local board placed appellant in Class I-A. Appellant appealed to the appeal board.

A secret investigation was conducted by the FBI and apparently the report made to the Department of Justice fully corroborated the claims of Affeldt to sincerity and the good faith of his conscientious objections. (71-72)

The Special Assistant to the Attorney General recommended to the appeal board that Affeldt be denied his conscientious objector status notwithstanding his sincerity because he was willing to fight in defense of his brothers and to use force in self-defense. The Special Assistant to the Attorney General apparently concluded that because he was willing to use force in defense of himself and his brothers he was not opposed to war in all its forms. (71-72)

The appeal board followed the recommendation and

placed Affeldt in Class I-A. (76 I) Affeldt was notified of this final classification. (13, 77)

On the trial, in the motion for judgment of acquittal, it was contended that there was no basis in fact for the denial of the conscientious objector classification. [12, 15] It was also contended that the recommendation of the Special Assistant to the Attorney General was illegal, arbitrary, capricious and in violation of the law. [17, 45] The motion for judgment of acquittal was denied. [49-50]

The question presented here, therefore, is whether the denial of the claim for classification as a conscientious objector was without basis in fact and whether the recommendation by the Department of Justice and the classification given to appellant by the appeal board were arbitrary, capricious and without basis in fact.

II.

Affeldt had been twice classified I-O. The local board had found him to be a conscientious objector. The appeal board had classified him as a conscientious objector. (11, 33, 47 I) The local board mailed to him a revised special form for conseeintious objector, identical to the original form that he had filled out, save and except an agreement to do civilian work in lieu of induction. (11, 48) Appellant returned the form unsigned. (12, 49, 50-53) He explained that he could not sign the form. (50-53)

The local board, because of his refusal to sign the revised form, took him out of the I-O conscientious objector classification and placed him in Class I-A. (56) Upon the hearing appellant said that the local board indicated prejudice against him because he had not signed the revised form. He again in his letter of appeal stated his reasons why. He stated he could not sign the form because it would violate his conscience. (60-61)

In the motion for judgment of acquittal it was contended that the change from the I-O to the I-A was arbitrary, capricious and without basis in fact, based solely on prejudice

because Affeldt had refused to fill out the revised conscientious objector form. [15] The motion was renewed at the close of all the evidence. [45] The motion was denied. [49-50]

The question presented here, therefore, is whether the local board abused its discretion and illegally and arbitrarily removed appellant from the conscientious objector status and placed him in a classification that made him liable for unlimited military service, contrary to the act and the regulations.

III.

Upon the occasion of the personal appearance following the I-A classification by the local board, the board members asked Affeldt if he attended a theological seminary or divinity school. He said no. He showed that he had studied in the congregation of Jehovah's Witnesses. [22, 23] The board members stated that because he had not gone to a college and received a diploma he could not be considered as an ordained minister. [23] Affeldt then asserted that he was, nevertheless, entitled to the regular minister's classification. [23]

The memorandum made after the personal appearance shows that what Affeldt testified is true. The board members stated that since Affeldt "is not an ordained minister, the board members felt that a IV-D is not warranted." The board continued him in I-A. (12, 59)

In the motion for judgment of acquittal it was contended that this illegal misconception of the law denied appellant his rights to a full and fair hearing on his ministerial claim. [15] This motion for judgment of acquittal was renewed. [45] The motion was denied. [49-50]

The question presented here, therefore, is whether the local board upon the personal appearance denied appellant the right to a full and fair hearing upon his claim for classification as a minister of religion. Because the board considered that he was not a minister because he had not at-

tended a college and had no diploma and because he was not an ordained minister in their opinion.

IV.

Upon the apperance of Affeldt before the hearing officer he found the hearing officer in a great hurry and very impatient. [20-21] He asked for permission to give evidence on the difference between a pacifist and a conscientious objector for the purpose of showing that he was, nevertheless, a conscientious objector, even though not a pacifist. This request was denied. The hearing officer said that he had heard all about Jehovah's Witnesses and that he did not need to read or get any more information about them. [20-21]

Affeldt then offered the hearing officer two documents for the purpose of refuting "any adverse testimony he had concerning me." [20-21] Affeldt also brought along with him to the hearing a witness to refute anything that might be brought up by the hearing officer that was adverse or unfavorable in the report of the FBI. [42]

Upon the personal appearance Affeldt asked the hearing officer if he had any information that was unfavorable or adverse. The hearing officer said that he "had nothing against my character, as far as my former employees and all my associates had testified that my character was above reproach." [43] Carbon copies of the two documents that Affeldt offered to the hearing officer were received into evidence as defendant's Exhibit's A and B. [38]

In the motion for judgment of acquittal it was contended that the hearing officer denied appellant of a full and fair hearing on his conscientious objector claim. [15] The motion for judgment of acquittal was renewed at the close of the evidence. [45] The motion was denied. [49-50]

The question presented here, therefore, is whether the hearing officer in the Department of Justice denied appellant his right to a full and fair hearing upon his claim for classification as a conscientious objector. The reason is that

the hearing officer denied appellant the right to show the difference between a pacifist and a conscientious objector and that appellant was a conscientious objector under the law although not a pacifist.

V.

The conscientious objector claim of appellant was forwarded to the Department of Justice for appropriate inquiry and hearing. (63) A complete investigation was made by the FBI before the case was referred to the Department of Justice for the hearing on the good faith of the conscientious objections. [25-28]

At the hearing the hearing officer had the secret FBI report before him. Affeldt asked the hearing officer if he had any adverse evidence against him. The hearing officer told him no. [43]

At the trial appellant subpoenaed the FBI report. The Government produced the FBI report. [25-27] The court made an *in camera* inspection of the FBI report. It then ordered the exhibit sealed and marked for identification. Appellant moved that the FBI report be received into evidence. [28] The Government objected to the receipt of the document into evidence and claimed the privilege of the Attorney General under Order No. 3229. [29-30] The court held that a privilege claimed by the Attorney General outweighed the prejudice to the appellant that denied him and his cousel the right to use the exhibit. [32, 44]

The appellant was denied the right to use the FBI report to determine whether the hearing officer had given a fair and adequate summary of the adverse information appearing in the FBI report.

The question presented here, therefore, is whether appellant was denied his right to have the use of the FBI report upon the trial to test and determine whether the summary made by the hearing officer was fair and adequate as he had a right to do, which is guaranteed by the due-process

clause of the Fifth Amendment, by the act and the regulations.

SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motion for judgment of acquittal duly made at the close of all the evidence.

II.

The district court erred in convicting the appellant and entering a judgment of guilty against him.

III.

The district court committed reversible error in refusing appellant the right to use the secret FBI investigative report at the trial as evidence to determine whether the summary of the adverse evidence given to the appellant by the hearing officer of the Department of Justice was fair and adequate as required by due process of law, the act and the regulations.

SUMMARY OF ARGUMENT

POINT ONE

The board of appeal had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant, and it arbitrarily and capriciously classified him in Class I-A.

The argument under this point has been previously made to this Court in the briefs for appellant in each of the companion cases, *Batelaan* v. *United States*, No. 13,939, at pages 14 to 35 and *Francy* v. *United States*, No. 13,940, at pages 16 to 22. Reference is here made to the argument made in those briefs at the pages referred to above. It is incorporated herein as though copied at length herein. The

Court is requested to consider it as though appearing herein.

A new point involved under this point is presented here. It was not argued or discussed in the other cases. It is the position taken by the hearing officer and the Department of Justice in their report and recommendation, respectively, that appellant is not a conscientious objector because he is not a pacifist. The position is assumed by the Government that because Jehovah's Witnesses do not believe that theocratic warfare by Jehovah God is wrong they are not opposed to both combatant and noncombatant service in the armed forces. It is said that because of this view appellant is not entitled to the classification of a conscientious objector.

The act and the regulations do not extend the inquiry to objections to ecclesiastical wars. It does not make pacifism a requirement. The 1917 Act confined the benefits of the law for conscientious objectors to pacifists. This limitation was rejected in the passage of the 1940 Act. Both the 1940 and 1948 acts extended the conscientious objector rights to all religious objectors. The objection to participation in war was not confined to pacifists or to membership in churches having pacifistic beliefs. It has been so held in *Taffs* v. *United States,* —F. 2d— (8th Cir. Dec. 7, 1953). So also does the 1951 re-enactment known as the Universal Military Training and Service Act.—See *United States* v. *Everngam,* 102 F. Supp. 128 (D. C. W. Va. 1951).

All that is required under the act to be a conscientious objector is that the registrant show: (1) he believes in the Supreme Being; (2) his belief imposes obligations to God higher than those owed to the Government; (3) he opposes both combatant and noncombatant military service; and (4) his beliefs are not political, sociological or philosophical, but are based on a belief in God.

Appellant squarely fit the statute regardless of his saying that he was not a pacifist. He showed that he believed in complete neutrality. See the booklet entitled "Neutrality"

in his file. This religious belief brought him clearly within the terms of the law.

It is respectfully submitted, therefore, that the appellant was entitled to classification as a conscientious objector and that the denial of the claim was arbitrary, capricious and without basis in fact.

POINT TWO

The reopening of the conscientious objector classification by the local board and the giving of the I-A classification to appellant purely because he declined to fill out the duplicate conscientious objector form was arbitrary, capricious and an abuse of discretion by the local board so as to deprive appellant of his rights under Section 1625 of the regulations.

Section 1625.2 of the regulations provides for a reopening of a classification when "based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification." Here there was no change in circumstances that justified a reopening of the case like those involved in *Tyrrell* v. *United States,* 200 F. 2d 8 (9th Cir.). The sole and only reason for reopening the case and taking appellant out of the conscientious objector status was the refusal to sign the duplicate form. The trial court found that appellant had a right to refuse to sign the duplicate form. It violated the provisions of Local Board Memorandum No. 41 of the Selective Service System.

It is respectfully submitted that when the local board took appellant out of the conscientious objector classification and classified him I-A there was a denial of appellant's rights to procedural due process contrary to the act and regulations.

POINT THREE

The local board, upon personal appearance, deprived appellant of a full and fair hearing when it rejected the law and the regulations and decided that a registrant could not make the claim as a minister of religion exempt from training and service unless he had attended a theological school, which was in violation of appellant's rights guaranteed by the regulations, the act, and the Fifth Amendment.

The undisputed evidence showed that Affeldt claimed classification as a minister of religion. This claim was in addition to his claim for classification as a conscientious objector.

It appeared that the board in considering the ministerial claim upon personal appearance did not follow the law or the regulations. It illegally imported into the law a false element or factor. The reliance upon this illegal basis as to what constitutes a minister of religion caused the board to disregard the law completely. It determined the ministerial claim for exemption upon irrelevant and immaterial standards. The board thus manufactured its own definition of a minister of religion and rejected the law. So doing it deprived appellant of the right to full and fair hearing.

It has been held that where local boards upon personal appearance failed to consider the ministerial claim of the registrant because of the fact that he did not attend a theological seminary or was not trained in the same manner as the orthodox ministers are trained the registrant has been deprived of a full and fair hearing upon personal appearance.—See *Niznik* v. *United States,* 184 F. 2d 972 (6th Cir.); *United States* v. *Kose,* 106 F. Supp. 433 (D. Conn. 1951).

The local board, therefore, denied appellant a full and fair hearing upon his claim for classification as a minister of religion. That the local board and the appeal board may have properly denied the claim for exemption is immaterial. The question here is not one of classification or whether the classification actually given was arbitrary,

capricious and without basis in fact. The contention here is not that the ministerial claim was denied without basis in fact. It is that appellant has been denied his rights to a full and fair hearing upon his personal appearance.

The fact that the appeal board reclassified appellant *de novo* is of no moment.—See *United States* v. *Laier,* 52 F. Supp. 392 (N. D. Calif. S. D.); *United States* v. *Romano,* 103 F. Supp. 597, 600 (S. D. N. Y. 1952); *United States* v. *Zieber,* 161 F. 2d 90, 93 (3d Cir.); *Davis* v. *United States,* 199 F. 2d 689 (6th Cir.); *Bejelis* v. *United States,* 206 F. 2d 354 (6th Cir.).

It is respectfully submitted, therefore, that the court below should have sustained the motion for judgment of acquittal on this ground.

POINT FOUR

The court below committed reversible error when it refused to receive into evidence the FBI report and excluded it from inspection and use by the court and the appellant upon the trial of the case.

Upon the trial appellant subpoenaed the secret investigative report of the FBI. A motion to quash was made by the Government. This was denied. At the trial the court permitted the report to be marked for identification and received as a sealed exhibit after the trial court made an inspection of the exhibit. The trial court found the secret FBI report to be material but refused to permit it to be used as evidence.

The court below committed grievous error when it refused to permit the exhibit to be used as evidence. It merely received the exhibit and permitted it to be marked for identification, and the court alone inspected it. The trial court excluded the exhibit and permitted it to come before this Court in sealed form for the limited purpose of determining whether it was in error in excluding the exhibit.

No claim of privilege is applicable here. The Govern-

ment waived its rights under the Order of the Attorney General, No. 3229, when it chose to prosecute appellant in this case. The FBI report was found to be material by the trial court. The judicial responsibility imposed upon the trial court to determine whether a fair and just summary was required to be given to the appellant overcomes and outweighs the privilege of Order No. 3229 of the Attorney General.—See *United States* v. *Andolschek,* 142 F. 2d 503 (2d Cir.); *United States* v. *Krulewitch,* 145 F. 2d 87 (2d Cir.); *United States* v. *Beekman,* 155 F. 2d 580 (2d Cir.); *United States* v. *Cotton Valley Operators Committee,* 9 F. R. D. 719 (W. D. La. 1949).

The Government must be treated like any other legal person before the court. It has no special privileges as the king did before the Stuart judges in England.—*Bank Line* v. *United States,* 163 F. 2d 133 (2d Cir.).

The secret investigative report was material. The trial court could not discard its judicial function in determining whether a full and adequate summary had been made of the secret investigative report without receiving the secret report into evidence and comparing it with the summary made by the hearing officer.—*United States* v. *Nugent,* 346 U. S. 1; *United States* v. *Evans,* 115 F. Supp. 340 (D. Conn. Aug. 20, 1953).

It is respectfully submitted, therefore, that the trial court committed error in excluding the FBI report from evidence and depriving appellant of the use of it upon the trial to ascertain whether the hearing officer made a full and fair summary of the secret FBI investigative report.

ARGUMENT

POINT ONE

The board of appeal had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant, and it arbitrarily and capriciously classified him in Class I-A.

The argument under this point has been previously made to this Court in the briefs for appellant in each of the companion cases, *Batelaan* v. *United States,* No. 13,939, at pages 14 to 35 and *Francy* v. *United States,* No. 13,940, at pages 16 to 22. Reference is here made to the argument made in those briefs at the pages referred to above. It is incorporated herein as though copied at length herein. The Court is requested to consider it as though appearing herein.

A new point involved under this point is presented here. It was not argued or discussed in the other cases. It is the position taken by the hearing officer and the Department of Justice in their report and recommendation, respectively, that appellant is not a conscientious objector because he is not a pacifist. The position is assumed by the Government that because Jehovah's Witnesses do not believe that theocratic warfare by Jehovah God is wrong they are not opposed to both combatant and noncombatant service in the armed forces. It is said that because of this view appellant is not entitled to the classification of a conscientious objector.

The Government has misinterpreted Section 6(j) of the act. The clause of the act that has been misinterpreted reads: " . . . is conscientiously opposed to participation in war in any form." The modifying phrase "in any form" applies to the word "participation"; it does not modify the word "war." If it is held to modify the word "war," then the Court must give the word "war" a reasonable interpretation. Certainly Congress was not legislating on Scriptural and spiritual wars that are prophesied in the Bible to be

conducted by Almighty God. Congress was dealing only with wars between the nations of earth. It had in mind legislating regarding flesh-and-blood wars that are fought on earth. It did not have in mind spiritual wars such as that described in the Bible in the book of Revelation.

Congress intended to protect the conscientious objector having objections to participation in war, even though he was in favor of the spiritual and Scriptural wars prophetically described in the Bible that concern the time of the end. If the unreasonable interpretation placed upon the act by the Government is accepted, then it would give a basis for casting out of the protection intended by Congress every religious person who has conscientious objections to participation in war between the nations purely because he believes in the model prayer of our Lord Jesus and the battle of Armageddon spoken of in Revelation. Such a situation is intolerable. It leads to fantastically unreasonable results.

Congress had in mind limiting its exemption to persons who are conscientiously opposed (based on religious grounds) to *any form of participation* in military service or wars between the nations. It was the conscientious objection to any form of military service participation that was exempted. Congress intended to limit the exemption to those refusing to participate in any form in war because of their conscientious objections; it was for this reason that the words "in any form" were used. Congress did not intend to permit those words to be used to discriminate. It has been specifically so held in *Taffs* v. *United States,* —F. 2d— (8th Cir. Dec. 7, 1953).

Congress did not intend to allow the Government to hold a religious inquest and probe into the religious beliefs of the registrants about spiritual wars or God-ordained wars of the future. Congress intended to protect the religious objector. It purposed to prohibit discrimination against the objector because he might have peculiar or unique religious views that do not agree with those of the majority in the

community. The words "in any form" were not intended to be used to conduct a heresy trial. Neither the courts nor the Department of Justice are authorized to say what is orthodox in the field of religion.

The entire argument of the Government should be rejected. The argument is that because Affeldt and Jehovah's Witnesses do not have pacifistic beliefs like the 'peace churches,' they are not covered by the law. The main reason why this argument should be rejected is that it attempts to weigh the correctness of religious beliefs. This is outside the jurisdiction of the draft boards, the Department of Justice and the courts.—*United States* v. *Ballard,* 322 U. S. 78.

The expression of the religious views of Jehovah's Witnesses by the legal governing body of the group, Watchtower Bible and Tract Society, Inc., in *The Watchtower,* the magazine relied upon by the Government, is an ecclesiastical determination. This religious administrative determination cannot be questioned in secular tribunals. It must be accepted as a genuine bona fide statement of conscientious objection to war. The ecclesiastical determination is binding on the draft boards, the Government and the courts. —*Kedroff* v. *Saint Nicholas Cathedral,* 344 U. S. 94; *Watson* v. *Jones,* 13 Wall. 679, 727, 728-729; *Gonzalez* v. *Archbishop,* 280 U. S. 1, 16-17; *United States* v. *Ballard,* 322 U. S. 78, at pages 85-88.

The Court cannot compare this statement of belief with the pacifistic beliefs of other religions and thus determine whether the beliefs fit the statute. The 1940 Act and the present act rejected the pacifism or 'peace-church' definition of the 1917 Act. To do this, as suggested by the appellee, also would convert the Court into a heresy tribunal. To reject religious beliefs on conscientious objection by comparison of Jehovah's Witnesses with other religious beliefs is in violation of the First Amendment to the United States Constitution.

All the Court can inquire about is confined to what the

act says. The act says that one is a conscientious objector entitled to the benefits of the law if he shows (1) he believes in the Supreme Being, (2) his belief imposes obligations higher than those owed to the state, (3) he opposes both combatant and noncombatant military service, and (4) his beliefs are not political, sociological or philosophical but are based on a belief in God.

This position of the Government (requiring Affeldt to be opposed to the universal ecclesiastical war of Armageddon before he can get the benefits of the statute), if accepted, will make a heresy tribunal of this Court. Neither the Government nor the courts can go beyond the law passed by Congress. Congress did not make this an element of the act. Congress was concerned only with the wars between the nations. Congress did not have in mind requiring the conscientious objector to be opposed to the ecclesiastical war of Armageddon. It is to be fought by God and not by man at the end of this wicked system of things, this world. —Isaiah 26:20, 21; Revelation 16:16; 19:11-14.

This position of strict neutrality, requiring refusal to participate in international conflicts between the forces of the nations of Satan's world, is also based on the Bible ground that Christians, Jehovah's Witnesses, are ambassadors who serve notice of the advance of the great warrior, Christ Jesus, who is leading the vast army of invisible warriors of the armed forces of Jehovah God. (2 Corinthians 5:20; Revelation 19:14) He is advancing against Satan's organization, all of which, human and demon, he will destroy at the battle of Armageddon.

Jehovah's Witnesses do not participate in the modern-day armed forces of Jehovah. (2 Chronicles 20:15-17) Participation in that armed force is limited to the powerful angelic host, led by the invisible Commander, Christ Jesus. He rides at the front on his great white war mount. (Revelation 19:11) The weapons of Caesar's armed forces of this world will look like children's toys in comparison with the weapons of the invisible forces of Jehovah God. (Joel 3:9-

15; Isaiah 40:15) Jehovah's weapons of destruction at Armageddon will be used by only his invisible forces and not by Jehovah's Witnesses.

The weapons of warfare wielded by Jehovah's Witnesses are confined to instruments that cannot be used in violent warfare. They use the "sword of the spirit, which is the word of God" as his Christian soldiers and ambassadors to warn the nations of this world of the coming battle of Armageddon. That will result in the defeat of all of Satan's armies and the wiping off the face of the earth all the nations and governments of this evil world. "For it is my decision to gather nations, to assemble kingdoms, that I may pour out my wrath upon them, all the heat of my anger, for in the fire of my zeal, all the earth shall be consumed." (Zephaniah 3:8, *An American Translation;* Jeremiah 25: 31-33; Nahum 1:9, 10) Therefore, they cannot give up the weapons of their warfare and take up the weapons of violence in behalf of the nations of the world of Satan. The use of such weapons by Jehovah's Witnesses and their participation in any way in the international armed conflicts would be in defiance of the unchangeable law of Almighty God.

There is no record that the Lord Jesus or his apostles or disciples entered the armies of Caesar. The record of secular history shows that the early Christians at Rome refused to fight in Caesar's army. They were thrown to the lions and persecuted because of following the command of Christ Jesus to disassociate themselves from the affairs of this evil world.

The present law is not like the 1917 Act, which limited the protection to the so-called peace churches or pacifist religions. Both the discussions in Congress and the reports on the 1940 Act show that Congress changed the law for conscientious objectors. Under the 1917 Act the exemption was confined to members of the peace churches. The 1940 Act eliminated the requirement of membership in a pacifist church. It let the exemption stand on an individual basis so

long as the person based his objections on belief in the Supreme Being.

Now the objections need not be pacifistic. They are sufficient when based on the Bible. Neither the 1951 Act nor the 1948 Act made reference to pacifism. Both acts did not fix the religious standard of any certain religion as the yardstick. The conscientious objection provision extends even to members of churches whose principles do not oppose war.—*United States* v. *Everngam,* 102 F. Supp. 128 (W. Va.).

The only change that the 1948 Act made was to prevent the nonreligious political, philosophical and sociological objectors from claiming the exemption.

If the path of the objector is through the Bible or through the writings of the religions of Shintoists, Moslems and Buddhists, he is entitled to his exemption. The 1948 Act protects him. The law does not prescribe any fixed path (such as pacifism) through any of the writings. It could not do so without invading religious freedom in violation of the First Amendment. To do so would make the draft boards and the courts a religious hierarchy to determine what is orthodox in conscientious objection. That Congress did not intend.

The undisputed evidence shows that Affeldt is sincere in his objections. He is opposed to any form of participation in war by himself. This objection comes from an immovable belief in the Supreme Being. It is not based on sociological, political or philosophical beliefs. It is supported by the direct Word of God, the Bible. It is not a limited objection that he has. He is not willing to join the army as a noncombatant soldier or go in as a conscientious objector only to actual combatant service. He objects to doing anything in the armed forces. He will not be a soldier.

It is when the Government in its brief misconceives the words "in any form" that it jumped the track. Because of the misinterpretation of these words used in Section 6(j)

of the act the Government completely missed the intent of Congress to be "fair and just."

Congress also provided for the restricted "participation" or limited service by the noncombatant soldier in Section 6(j) of the act. It was *participation* for which the entire act was passed. It was to make all participate except those who objected to participation on conscientious religious grounds. What it was protecting, by the use of the words "in any form" in Section 6(j), was the objector to *military participation in any form.*

Congress did not intend to limit the exemption by a strange meaning placed upon the words "in any form" by the Government. That would make inconsistency and ambiguity appear on the face of the act. If Congress intended to make it necessary to have objections to war "in any form" then the limited military service afforded the conscientious objector willing to do noncombatant military service in the armed forces provided by Congress would have been defeated. Congress did not contradict itself and write Section 6(j) of the act with a patent ambiguity in it. Congress was right. The Government is wrong. The appellant is right and is supported by a fair and reasonable reading of the act.

The construction that has been placed upon the act by the Government is unreasonable. It words a forfeiture against a large segment of religion in the United States. The interpretation of the act would place all Jehovah's Witnesses entirely beyond the reach of the law. This would be notorious discrimination of the worst sort.

It was well known to the Congress, the nation, the Government and the courts of the United States that Jehovah's Witnesses are conscientiously opposed to noncombatant military service. They were aware of the fact that these objections of Jehovah's Witnesses are based on a belief in the supremacy of God's law above obligations arising from any human relationship. These facts bring Jehovah's Witnesses within the plain words of the act. Twisting the words

of the law and discoloring the act subvert the intent of Congress not to discriminate.

The strict construction of the act advocated by the Government in its brief was not intended by Congress. It had in mind a liberal interpretation of its provision for conscientious objectors to protect the religious as well as the pacifistic objector. The records of the hearings in Congress, the reports and the act all prove a broad exemption for all religious objectors was intended. Congress had in mind that objection to war is a part of the religious history of this country. Conscientious objection was recognized by Massachusetts in 1661, by Rhode Island in 1673 and by Pennsylvania in 1757. It became part of the laws of the colonies and states throughout American history. It finally became part of the national fabric during the Civil War and has grown in breadth and meaning ever since. (See Selective Service System, *Conscientious Objection,* Special Monograph No. 11, Vol. I, pp. 29-66, Washington, Government Printing Office, 1950.) So strongly was the principle of conscientious objection imbedded in American principles that President Lincoln and his Secretary of War thought that conscientious objectors had to be recognized. This is impressed upon us by Special Monograph No. 11, Vol. I, *supra,* at page 43: "At the end of hostilities Secretary of War Stanton said that President Lincoln and he had 'felt that unless we recognize conscientious religious scruples, we could not expect the blessing of Heaven'."

As appears above, the Selective Service System in Special Monograph No. 11, Vol I, carries the history far back, even before the American Revolution. (*Ibid.,* pages 29-35) Virginia and Maryland exempted the Quakers from service. (*Ibid.,* page 37) From the Revolution to the Civil War provision for exemption of conscientious objectors appears in the state constitutions. During the Civil War the military provost marshal was authorized to grant special benefits to noncombatants under Section 17 of the act,

approved February 24, 1864. Lincoln was urged to force conscientious objectors into the army. He replied:

> "No, I will not do that. These people do not believe in war. People who do not believe in war make poor soldiers. . . . These people are largely a rural people, sturdy and honest. They are excellent farmers. The country needs good farmers fully as much as it needs good soldiers. We will leave them on their farms where they are at home and where they will make their contributions better than they would with a gun."—*Ibid.,* pages 42-43.

Congress certainly must have had in mind the historic national policy of fair treatment to conscientious objectors. The well-known governmental sympathy toward the Quakers and others was not ignored by Congress when the act was passed. Congress must have had in mind the historic considerations enumerated by the Supreme Court in *Girouard* v. *United States,* 328 U. S. 61, 68-69.

In passing the provisions for conscientious objection to war in all the draft laws Congress had this long history in mind. It intended to preserve the freedom of religion and conscience in regard to conscientious objection, and it provided a law whereby such freedom could be preserved.

The interpretation of the Government in its brief in this case is narrow, unreasonable, and discriminatory. It undermines the intent of Congress. It flouts the history of fair treatment of conscientious objectors. It twists the words of the law for the purpose of illegally pulling an unpopular religion outside the protection of the law. Congress did not intend any such un-American and unscriptural discrimination. It frames mischief by unequal protection of law condemned by the law of the land and by God.—Psalm 94 : 20.

The unfairness and partiality urged by the Government are discrimination of the sort that ought to be stopped by this Court. The Supreme Court of the United States has

many times condemned discrimination of the sort urged by the Government in its brief in this case.—See *Niemotko* v. *Maryland,* 340 U. S. 268, at page 272, and *Fowler* v. *Rhode Island,* 345 U. S. 67, at pages 69-70.

It is respectfully submitted that there was no basis in fact for the denial of the conscientious objector status, that the recommendations of the hearing officer and the Department of Justice and the final classification based thereon were arbitrary, capricious and illegal.

POINT TWO

The reopening of the conscientious objector classification by the local board and the giving of the I-A classification to appellant purely because he declined to fill out the duplicate conscientious objector form were arbitrary, capricious and an abuse of discretion by the local board so as to deprive appellant of his rights under Section 1625 of the regulations.

Section 1625.1(a) provides that no classification is permanent. Section 1625.1(b) requires the registrant to report to the local board any facts that might cause the registrant to be classified differently. Section 1625.1(b) requires the local board to keep itself informed as to the status of registrant.

Section 1625.2 provides as follows:

> *"When Registrant's Classification May Be Reopened and Considered Anew.*—The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would

justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

Section 1625.2 of the regulations does not give the local boards authority to set aside a classification purely on speculation or prejudice or because it desires to penalize the registrant.

Section 1622.1 of the regulations provides that a registrant be selected for training and service "in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective economy."

Section 1622.1(d) specifically prohibits the local board from discriminating against a registrant. It provides: "Each such registrant shall receive equal justice." The regulation (1625.2) plainly contemplates a change in the registrant's classification and a reopening of his case only when there has been some change of a factual nature.

In this case there was no factual change at all. The only thing that happened was that the local board mailed to registrant a duplicate conscientious objector form. The registrant returned this. He explained to the board why he could not fill it out. It required him to agree to do civilian work of national importance. He stated that he was claiming classification as a minister of religion. The local board was requested to classify him as a minister and for that reason appellant returned the new duplicate form unsigned. He did not fill it out as requested by the board. The evidence also shows that when he refused to sign the form the local

board considered that appellant had defied its orders. It then attempted to penalize him by taking away his conscientious objector status, because he did not fill out the form.

The local board was not authorized to penalize appellant because of his refusal to fill out the form in this manner. The local board is not the law enforcement agency. The statute and the regulations have placed the enforcement of the law in the hands of the United States Attorney. The local board is merely a classifying agency. It was the duty of the local board to classify Affeldt according to his papers on file. The local board did not have any evidence contradicting what he said. It was the responsibility of the board to keep appellant in the conscientious objector classification.—*Annett* v. *United States,* 205 F. 2d 689 (10th Cir.); *United States* v. *Graham,* 109 F. Supp. 377, 378 (W. D. Ky.); *United States* v. *Pekarski,* —F. 2d— (2d Cir. October 23, 1953); *United States* v. *Alvies,* 112 F. Supp. 618, 623-625; *Taffs* v. *United States,* —F. 2d— (8th Cir. Dec. 7, 1953).

The mere fact that appellant was refusing to agree to do work of national importance because he was pressing his claim for classification as a minister of religion and insisting that the board classify him as such did not, in any sense of the word, justify the local board in denying the conscientious objector status. His refusal to sign the new form and agree to do work of national importance did not make a waiver of his conscientious objector claim.—*Cox* v. *Wedemeyer,* 192 F. 2d 920 (9th Cir.).

The only authority that the local board had under the act would have been to report appellant as a delinquent to the United States Attorney. Had he violated the law in refusing to fill out the conscientious objector form the second time he could have been prosecuted. It was entirely illegal and contrary to the act, arbitrary and capricious, and an abuse of discretion for the local board to inflict punishment upon appellant by taking his conscientious objector classification away from him. The court below found that the law did not require Affeldt to fill out the conscien-

tious objector form the second time. The special instructions from the National Headquarters of the Selective Service System to the local boards, in Local Board Memorandum No. 41, specifically prohibit a waiver of the conscientious objector claim in circumstances similar to this.

Local Board Memorandum No. 41 provides as follows:

"National Headquarters
"Selective Service System
"Washington 25, D. C.

"Local Board Memorandum No. 41
"Issued: November 30, 1951.
"As Amended: August 15, 1952.
"Subject: Withdrawal of Claim of Conscientious Objection

"1. Purpose.—The purpose of this Local Board Memorandum is to furnish information as to the circumstances under which claims of conscientious objection made by registrants should be considered to have been withdrawn.

"2. What Constitutes a Claim of Conscientious Objection.—A registrant should be considered to have claimed conscientious objection to war if he has signed Series XIV of the Classification Questionnaire (SSS Form No. 100), if he has filed a Special Form for Conscientious Objector (SSS Form No. 150), or if he has filed any other written statement claiming that he is a conscientious objector.

"3. Withdrawal of Claim Must Be in Writing.—Whenever a registrant has claimed conscientious objection to war the claim shall not be considered to have been withdrawn until the registrant voluntarily submits, and there is filed in his Cover Sheet (SSS Form No. 101), a written statement signed by him specifically withdrawing

the claim. No verbal statement made by the registrant shall be considered as a withdrawal of his claim of conscientious objection. After such written withdrawal has been filed, the previous claim of conscientious objection shall be disregarded when considering the classification of the registrant.

"4. When Claim Should Not Be Considered Withdrawn.—(a) A claim of conscientious objection should not be considered to have been withdrawn even though the registrant has filed a written withdrawal of his claim if it appears that the withdrawal was not a voluntary act on the part of the registrant or that the withdrawal was induced or procured by a representative of the Selective Service System or any other Government official. The claim should not be considered withdrawn if the registrant's written withdrawal was induced by any representation or suggestion that, if he withdrew the claim, he would receive more favorable consideration of other claims, or greater weight probably would given to another claim. If the registrant has been advised that he must withdraw his claim of conscientious objection before he may appeal his classification on other grounds, the registrant's written withdrawal of his claim is not voluntary and the claim should not be considered withdrawn.

"(b) When a registrant who has claimed conscientious objection has filed a written notice of appeal in which he appealed his classification solely on the basis of any other claim or claims, such action does not constitute a withdrawal of his claim of conscientious objection. For example, if in such a case the registrant appeals only as a

minister, his claim of conscientious objection is not thereby withdrawn.

"(signed) LEWIS B. HERSHEY
Director"

The decision of this Court in *Tyrrell* v. *United States,* 200 F. 2d 8 (9th Cir.), is not applicable here. In that case there was a change in the need for greater strength in the manpower of the armed forces from the time of the original classification to the reclassification. There was no showing here that the manpower strength of the armed forces had diminished, justifying a reopening of the classification.

The undisputed evidence in the case shows to the contrary that no such reasons were relied upon by the local board. The only reason for the reopening of the classification and the change of the conscientious objector status to liability for unlimited military service was that the local board sought to punish appellant for his failure to fill out the second conscientious objector form and agree to do work of national importance. *Tyrrell* v. *United States, supra,* is therefore inapplicable. The decision of this Court in *Cox* v. *Wedemeyer,* 192 F. 2d 920 (9th Cir.), supports the appellant under this point, that there has been an abuse of discretion and an arbitrary and capricious denial of due process of law in the reopening of the classification.

In *United States* v. *Ryals,* 56 F. Supp. 773, the court held that there was a denial of procedural due process of law when the local board, without a change in the factual status of the registrant, reopened and reclassified the registrant. The court found that the reopening and reclassification, changing Ryals from an exempt status to liability for unlimited military service, was arbitrary and capricious. The decision in the *Ryals* case (*United States* v. *Ryals,* 56 F. Supp. 773) rather than *Tyrrell* v. *United States,* 200 F. 2d 8 (9th Cir.), is applicable here.

It is therefore respectfully requested that the Court hold that the reopening of the case and the change of appel-

lant from the conscientious objector status to a classification that made him liable for unlimited military training and service was arbitrary, capricious and constituted an abuse of discretion on the part of the local board.

POINT THREE

The local board, upon personal appearance, deprived appellant of a full and fair hearing when it rejected the law and the regulations and decided that a registrant could not make the claim as a minister of religion exempt from training and service unless he had attended a theological school, which was in violation of appellant's rights guaranteed by the regulations, the act, and the Fifth Amendment.

The memorandum made by the local board showed the reason why the local board, upon personal appearance, refused to listen to Affeldt or consider his claim for classification as a minister of religion. The memorandum shows that Affeldt was denied a full and fair hearing before the board. The board had reached the conclusion that a registrant was required by law to attend a theological seminary before he was eligible to be classified as a minister of religion. As a result of this the evidence offered by Affeldt upon the personal appearance was rejected.

In his papers Affeldt had shown that he had satisfactorily pursued the course of study prescribed by Watchtower Bible and Tract Society, the legal governing body of Jehovah's Witnesses. He showed that he had completed the training for the ministry prescribed by the organization of Jehovah's Witnesses. He showed in his papers that he was a minister.

The law did not require that he go to a theological school or attend a divinity school. His attendance at the Watchtower school was sufficient. He showed that he had a knowledge of the Bible and was apt to teach and preach as a minister. The organization permitted him to teach and preach as a minister. This was an ecclesiastical determina-

tion as to his schooling and qualifications. This determination could not be questioned by the board or by the courts.

Appellant's former background and schooling for the ministry cannot be questioned. This also is armored completely by an ecclesiastical determination of Jehovah's Witnesses that was binding upon the draft board. It is conclusive. It can be questioned neither by the Government nor by the courts.

Congress did not intend that a minister have his background questioned. Senator Tom Connally specifically rejected such efforts when this act was brought before Congress. He said:

> "Mr. President, when I was a boy none of the preachers whom I ever heard preach could have taken the benefit of that exemption. . . . Many good old cornfield preachers who gathered their flocks around an open Bible on Sunday morning or gathered their flocks in camp meeting in the summertime, and got more converts during those two weeks than they got all the year, because next year they would get all those converts over again and then some new ones, never saw a divinity school. They never were in a seminary; but they walked with their God out yonder amidst the forests and plains; they read His book at night by kerosene lamp or tallow candle."—86 Cong. Rec. 10589-10590.

There is nothing in the terms of the act or the regulations that authorizes the local board to prescribe that registrants must attend theological seminaries or divinity schools before they can be considered to be ministers. The above quotation by Senator Tom Connally on the floor of the Senate indicates that Congress intended that the schooling and background of ministers of religion should not be inquired into by the members of the draft boards.

To permit the draft boards to pry into the schooling of

ministers and compare the schooling of one with that of another would allow the draft boards to set themselves up as religious hierarchies. It would permit discrimination among the various religions and between different ministers registered with the local board. Freedom of religion and the spirit of toleration in this country completely forbid such a view.

The hearing given by the local board to the appellant upon his personal appearance did not meet the requirements of the law. The local board did not comply with Section 1622.1 of the regulations. (32 C. F. R. 1622.1(d)) This regulation provides:

> "(d) In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization. Each such registrant shall receive equal justice."

It has been held that whenever a draft board inquires into and considers the religious training and background of the registrant the regulations are violated. These courts have held that when draft boards hold that it is necessary for a registrant to attend a theological seminary or divinity school as a prerequisite to claiming the exemption as a minister of religion there is a denial of a full and fair hearing upon the personal appearance.—*Niznik* v. *United States,* 184 F. 2d 972 (6th Cir.); *United States* v. *Kose,* 106 F. Supp. 433 (D. Conn. 1951).

It is respectfully submitted that the local board, upon the occasion of the personal appearance in this case. de-

prived Affeldt of his right to a full and fair hearing. Due process of law was denied. For this reason it was the duty of the court below to grant the motion for judgment of acquittal. The order overruling the motion and the judgment of conviction, therefore, constitute reversible error.

POINT FOUR

The court below committed reversible error when it refused to receive into evidence the FBI report and excluded it from inspection and use by the court and the appellant upon the trial of this case.

Upon the trial appellant subpoenaed the secret investigative report of the FBI. A motion to quash was made by the Government. This was denied. At the trial the court permitted the report to be marked for identification and received as a sealed exhibit. The trial court found the secret FBI report to be material but refused to permit it to be used as evidence.

This point has been extensively argued under Point Two of appellant's brief in *Batelaan* v. *United States,* No. 13,939, the companion case to this one. See pages 36 to 47 of that brief. Reference is here made to the argument in that case in the above mentioned pages. It is incorporated herein as though copied at length. The Court is requested to consider this argument as though it was made here.

The trial court committed reversible error in excluding the FBI report from the evidence. The court should have allowed it to be inspected and used by appellant at the trial below for the purpose of determining whether a fair and adequate summary of the FBI report was given to Affeldt.

CONCLUSION

WHEREFORE it is respectfully submitted that the judgment of the court below should be reversed. The trial court should be directed to enter a judgment of acquittal. In the alternative appellant prays that the Court reverse and remand the case for a new trial.

Respectfully submitted,

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Counsel for Appellant

December, 1953.

No. 13941

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES WILLIAM AFFELDT, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

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IN THE

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CHARLES WILLIAM AFFELDT, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

I.

STATEMENT OF JURISDICTION.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California on December 3, 1952, under Section 462 of Title 50, App. United States Code.

On December 22, 1952, the appellant was arraigned, entered a plea of not guilty, and the case was set for trial on March 12, 1953.

On March 12, 1953, appellant was tried in the United States District Court for the Southern District of California, before the Honorable William C. Mathes, sitting without a jury, and was found guilty as charged in the Indictment.

On April 7, 1953, appellant was sentenced to imprisonment for a period of four years and judgment was so entered. Appellant appeals from this judgment.

The District Court had jurisdiction of this cause of action under Section 462 of Title 50, App., United States Code, and Section 3231, Title 18, United States Code.

This Court has jurisdiction of the appeal under Section 1291 of Title 28, United States Code.

II.

STATUTES INVOLVED.

The Indictment in this case was brought under Section 462 of Title 50, App., United States Code.

The Indictment charges a violation of Section 462 of Title 50, App., United States Code, which provides, in pertinent part:

> "(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said section] . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . ."

III.

STATEMENT OF THE CASE.

The Indictment charges as follows:

"Indictment

[U. S. C., Title 50, App., Section 462—Universal Military Training and Service Act.]

The grand jury charges:

Defendant Charles William Affeldt, Jr., a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 81, said board being then and there duly created and acting, under the Selective Service System established by said act, in Ventura County, California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class I-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on November 13, 1952, in Los Angeles County, California, within the Central Division of the Southern District of California; and on or about said date in Los Angeles County, California, within the division and district aforesaid, the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do."

On December 22, 1952, the appellant appeared for arraignment and plea, represented by J. B. Tietz, Esq., be-

fore the Honorable Ernest A. Tolin, United States District Judge, and entered a plea of not guilty to the offense charged in the Indictment.

On March 12, 1953, the case was called for trial before the Honorable William C. Mathes, United States District Judge, sitting without a jury, and on March 19, 1953, appellant was found guilty as charged in the Indictment.

On April 7, 1953, appellant was sentenced to imprisonment for a period of four years in a penitentiary.

Appellant assigns as error the judgment of conviction on the following grounds:

A—The District Court erred in failing to grant the Motion for Judgment of Acquittal duly made at the close of all the evidence.

B—The District Court erred in convicting the appellant and entering a judgment of guilty against him.

C—The District Court committed reversible error in refusing appellant the right to use the secret FBI investigative report at the trial as evidence to determine whether the summary of the adverse evidence given to the appellant by the Hearing Officer of the Department of Justice was fair and adequate as required by due process of law, the Act and the regulations.

IV.

STATEMENT OF THE FACTS.

On September 10, 1948, Charles William Affeldt, Jr., registered with Local Board No. 81, Ventura, California. He was twenty-two years of age at the time, having been born on September 11, 1926.

On November 18, 1948, Charles William Affeldt, Jr., filed with Local Board No. 81, SSS Form 100, Classification Questionnaire, and by signing Series VI of this questionnaire informed the Local Board of his claim for exemption as a minister of religion. Appellant also signed Series XIV, claiming exemption as conscientious objector.

On November 18, 1948, Affeldt filed with Local Board No. 81 SSS Form 150, Special Form for Conscientious Objector.

On November 22, 1948, Affeldt filed an Affidavit of Dependency, claiming he had three dependents.

On November 30, 1948, Affeldt was classified 3-A by the Local Board and he was sent an SSS Form 110, Notice of Classification, the following day.

On October 23, 1951, Affeldt was classified 1-O by the Local Board and he was sent an SSS Form 110, Notice of Classification, the following day.

On November 2, 1951, Affeldt requested a personal appearance before the Local Board. A personal appearance before the Local Board was granted for November 6, 1951.

On November 6, 1951, Affeldt appeared before the Local Board. Affeldt was continued in Class 1-O and was notified of this action by the mailing of an SSS Form 110, Notice of Classification, to him.

On November 15, 1951, Affeldt appealed his classification of 1-O.

On December 11, 1951, Affeldt was classified 1-O by the Appeal Board.

On December 13, 1951, Affeldt was mailed a revised SSS Form 150, Special Form for Conscientious Objector.

On December 18, 1951, Affeldt returned the revised SSS Form 150, Special Form for Conscientious Objector, to the Local Board. He had not completed the form.

On February 19, 1952, Affeldt was classified 1-A by the Local Board and he was so notified by the mailing of an SSS Form 110, Notice of Classification, to him.

On February 27, 1952, Affeldt requested a personal appearance before the Local Board. A personal appearance before the Local Board was granted for March 4, 1952.

On March 4, 1952, Affeldt appeared before the Local Board. Affeldt was continued in Class 1-A and he was so notified by the mailing of an SSS Form 110, Notice of Classification, to him.

On March 18, 1952, the Appeal Board reviewed Affeldt's Selective Service file and determined that he should not be classified either in Class 1-A-O or in Class 1-O and forwarded the file to the Department of Justice. A hearing was held by the Department of Justice Hearing Officer on July 28, 1952. The Hearing Officer recommended that Affeldt should be classified in Class 1-A.

On September 25, 1952, Affeldt was classified 1-A by the Appeal Board and he was advised of this action by the Local Board on October 2, 1952.

On October 17, 1952, SSS Form 252, Notice to Report for Induction, was mailed to Affeldt, ordering him to report for induction into the armed forces of the United States on November 13, 1952, at Los Angeles, California.

On November 13, 1952, Affeldt reported for induction as ordered, but refused to submit to induction into the armed forces of the United States.

V.

ARGUMENT.

A. Replying to Appellant's Assignment of Error, the Government Contends That the Classification Given the Appellant of 1-A Was Not Arbitrary and Capricious and Was Supported by Evidence Establishing a Basis in Fact.

There is no constitutional right to exemption from military service because of conscientious objection or religious calling. In *Richter v. United States,* 181 F. 2d 591 (9th Cir.), this Court says:

> "Congress can call everyone to the colors, and immunity from military service arises solely through congressional grace in pursuance of traditional American policy of deference to conscientious objection, and there is no constitutional right to exemption because of conscientious objection or religious calling or conviction or activities."

Accord:

Tyrrell v. United States, 200 F. 2d 8 (9th Cir.).

Congress has granted exemptions and deferments from military service only to those who qualify under the procedure set up by Congress to determine classification—the Selective Service System. This procedure is administrative in nature, even though one may be criminally prosecuted for failure to comply with the orders of the Selective Service System.

Falbo v. United States, 320 U. S. 549;

Williams v. United States, 203 F. 2d 85.

The duty to classify, to grant or deny exemptions rests upon the draft boards, local and appellate. The burden

is upon a registrant claiming an exemption or deferment to establish his eligibility therefor to the satisfaction of the local board.

United States v. Schoebel, 201 F. 2d 31 (7th Cir.);
Davis v. United States, 203 F. 2d 853 (8th Cir.).

Each registrant is presumed to be available for military service.

32 C. F. R., Sec. 1622.1(c);
United States v. Schoebel, supra.

Every registrant who fails to establish to the satisfaction of a local or appellate board his eligibility for exemption or deferment is placed in Class 1-A.

32 C. F. R., Sec. 1622.10.

In the instant case, both the local and appellate boards considered the claims for exemption made by the appellant. Both boards rejected the appellant's claim based upon the information presented to them.

The classification by the Local Board and thereafter by the Appeal Board, made in conformity with the regulations, was final. The United States Supreme Court in *Estep v. United States,* 327 U. S. 114, at pages 122-133, in considering this point, says:

> ". . . The provision making the decision of the local boards 'final' means to us that Congress was not to give administrative action under this Act the customary scope of judiciary review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity

with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."

The Selective Service file of the appellant in the present case indicates sufficient basis in fact for the denial of the local and appellate boards of his claims as a minister and conscientious objector.

There was, therefore, no error in the ruling of the Trial Court in refusing to grant appellant's Motion for Judgment of Acquittal.

B. The Reclassification of the Appellant by the Local Board Was Not Arbitrary and Capricious.

The classification of registrants by Local Boards is provided by 50 U. S. C. A., App., Section 460, which provides in pertinent part:

". . .

(b) The President is authorized—

(3) To create and establish . . . local boards . . . such local boards, . . . shall, under rules and regulations prescribed by the President, have the power . . . to hear and determine, . . . all questions or claims, with respect to inclusion or exemption or deferment from, training and service under this title (said sections), of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final, except where an appeal is authorized and is taken in accordance with such rule and regulations as the President may prescribe . . ."

The limitations placed upon a trial court in the review of the classification given a Selective Service registrant were defined in the case of *Cox v. United States,* 332 U. S. 442. The Court in the *Cox* case, *supra,* says at page 448:

> "The scope of review to which petitioners are entitled, however, is limited; as we said in Estep v. United States, 327 U. S. 114, 122-3: 'The provision making the decisions of the local boards "final" means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the *courts are not to weigh the evidence* to determine whether the classification made by the local boards was justified. *The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous.* The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.'" (Emphasis added.)

Selective Service Regulations, Section 1622.20 (32 C. F. R. 1622.20) provided:

> "1622.20 Class IV-E: Conscientious Objector Available for Civilian Work Contributing to the Maintenance of the National Health, Safety or Interest—
>
> (a) In Class IV-E shall be placed every registrant who would have been classified in Class 1-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.

(b) Section 6(j) of Title I of the Selective Service Act of 1948 provides in part as follows: 'Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.' "

This section of the Selective Service Regulations defines in broad terms the qualifications necessary for classification as a conscientious objector in classification IV-E. The application of this description to particular registrants is a duty imposed upon the Local Board. The Local Board was left to determine how and when a registrant claiming exemption from military service by reason of conscientious objection was to be qualified. The exercise of that discretion, even though it may have been erroneous, is final, in the absence of arbitrary or capricious conduct on the part of the Local Board so classifying a registrant.

Cox v. United States, supra.

To aid the Local Board in its determination of the conscientious objector claims of registrants, the Selective Service System uses SSS Form 150, Special Form for Conscientious Objector. The questions and answers given thereto by a registrant are the basis of a classification by a Local Board within the broad terms of Selective Service Regulations, Sections 1622.6 and 1622.20. The burden is upon the registrant to maintain and prove his claim within these categories. *Davis v. United States,* 203 F. 2d 853. This burden was not met by the appellant in the present case as evidence by the classification given him by the Local Board.

Section 1625.1(a) provides that no classification is permanent. Section 1625.1(b) requires the registrant to report to the local board any facts that might cause the registrant to be classified differently. Section 1625.1(b) requires the local board to keep itself informed as to the status of registrant.

Section 1625.2 provides as follows:

> *"When Registrant's Classification May Be Reopened and Considered Anew*—The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

The question presented here for consideration, therefore, is whether or not the Local Board acted arbitrarily and capriciously in classifying the appellant 1-A. The evidence shows that appellant was mailed a revised SSS

Form 150, Special Form for Conscientious Objector. This the Local Board had a right to do. The appellant refused to fill out the SSS Form 150, and notified the Local Board for the reasons for his act. He said he would not accept work of national importance. Induction in Class 1-O would require him to perform this type of work. Part of the eligibility for classification as a conscientious objector is the acceptance of the burdens attached to that classification. It can be argued, therefore, that by voicing his refusal to accept the burdens of work of national importance attached to his classification in Class 1-O, the Local Board could reasonably have determined that though appellant had not specifically withdrawn his claim as a conscientious objector, he was not eligible for such classification. That is, he had not sustained the burden of establishing his eligibility for exemption.

No evidence of arbitrary or capricious conduct on the part of the Local Board being shown by the evidence and there being a basis in fact, the Trial Court properly refused to grant appellant's Motion for Judgment of Acquittal.

C. There Was No Error Made by the Local Board in Refusing to Classify Appellant as a Minister of Religion.

There is no constitutional right to exemption from military service because of conscientious objection or religious calling. In *Richter v. United States*, 181 F. 2d 591 (9th Cir.), this Court said:

> "Congress can call everyone to the colors, and immunity from military service arises solely through congressional grace in pursuance of traditional Amer-

ican policy of deference to conscientious objection, and there is no constitutional right to exemption because of conscientious objection or religious calling or conviction or activities."

Accord,

Tyrrell v. United States, 200 F. 2d 8 (9th Cir.).

Congress has granted exemption and deferment from military service only to those who qualify under the procedure set up by Congress to determine classification—the Selective Service System. This procedure is administrative even though one may be criminally prosecuted for failure to comply with the orders of the Selective Service System.

Falbo v. United States, 320 U. S. 549;

Williams v. United States, 203 F. 2d 85 (9th Cir.).

The duty to classify, to grant or deny exemptions rests upon the draft boards, local and appellate. The burden is upon a registrant to establish his eligibility for deferment, or exemption, to the satisfaction of the local board.

United States v. Schoebel, 201 F. 2d 31 (7th Cir.);

Davis v. United States. 203 F. 2d 853 (8th Cir.).

Each registrant is considered to be available for military service.

32 C. F. R., Sec. 1622.1(c);

United States v. Schoebel, supra.

Every registrant who has failed to establish to the satisfaction of the local board that he is eligible for classification in another class is placed in Class 1-A.

32 C. F. R., Sec. 1622.10.

The local board carefully considered the claim of the appellant for a minister's exemption, Class 4-D, at a meeting of the local board. The Appeal Board considered this claim also, and both boards rejected it based on the information they had on hand.

The classification of the local board, and thereafter of the Appeal Board is final. The United States Supreme Court in *Estep v. United States,* 327 U. S. 114 at pages 122-133, states in this regard:

> ". . . The provision making the decision of the Local Board's 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judiciary review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."

Accord:

> *Martin v. United States*, 190 F. 2d 774 (4th Cir.), cert. den. 342 U. S. 872.

In the present case, the appellant was employed on a full-time basis in a secular activity. Both the Local Board and the Appellate Board reviewing the file could reasonably have determined that appellant's ministerial activities were incidental in nature to his secular activity, so that he would not be entitled to an exemption as a minister of religion. The evidence does not indicate any arbitrary

or capricious action on the part of either the local or appellate board, and therefore, the Trial Court properly denied appellant's Motion for Judgment of Acquittal.

D. There Was No Error in the Refusal of the Trial Court to Receive Into Evidence the Investigative Report of the Federal Bureau of Investigation.

It is established that exemption by reason of religious training and belief is not a constitutional right, *United States v. MacIntosh,* 283 U. S. 605; *Girouard v. United States,* 328 U. S. 61. However, Congress has provided for exemption by reason of religious training and belief. In making such a provision, Congress established a certain procedure to be followed in the procuring of these exemptions. Establishment of such a procedure has created certain "rights" which must be afforded all persons who can establish eligibility under its provisions. A variance from this procedure which prejudices the registrant in his request for exemption is admittedly a denial of due process.

Title 50, App., United States Code, Section 456, provides for deferments and exemptions from military training and service. Subsection (j) of Section 456 provides in pertinent part:

> "(j) . . . Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such

claim to the Department of Justice for *inquiry and hearing*. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned. . . ." (Emphasis added.)

It is with the "inquiry and hearing" referred to in subsection (j) of Section 456 of the Universal Military Training and Service Act that we are concerned in the present case. Under the authority of subsection (j), the Attorney General has established certain procedures to be followed in the inquiry and hearing to be held by the Department of Justice. Provision is made for an investigation and report by agents of the Federal Bureau of Investigation. These reports are then forwarded to a Hearing Officer for his use in the hearing he conducts with respect to the character and good faith of the claims of conscientious objection of each particular registrant.

Prior to such a hearing, the Hearing Officer mails to the registrant a Notice of Hearing and Instructions to Registrants Whose Claims for Exemption as Conscientious Objectors Have Been Appealed. These instructions provide in part:

"2. *Upon request* therefor by the registrant at any time *after receipt by him of the notice of hearing, and before the date set for the hearing,* the Hearing Officer will advise the registrant as to the general nature and character of any evidence in his possession which is unfavorable to, and tends to defeat the claim of the registrant, such request being granted

to enable the registrant more fully to prepare to answer and refute at the hearing such unfavorable evidence." (Emphasis added.)

Since there is no constitutional right to exemption because of religious training and belief, any claimed denial of due process must necessarily, then, be based upon a variance from the procedures established by Congress or by administrative officials under a proper delegation of powers.

The evidence in the present case discloses that a request was made by the appellant for adverse information held by the Hearing Officer. However, this request was not made until the appellant appearing for his hearing. [Tr. pp. 42-43.][1] It was, therefore, not a timely request made upon the Hearing Officer.

Assuming that it can be argued that appellant's request was timely, the Court made an *in camera* examination of the investigative reports of the Federal Bureau of Investigation and determined that their evidentiary value was outweighed by the public interest in preserving the confidential nature of executive documents. It is within the power of the Trial Court to exclude irrelevant, immaterial and incompetent evidence. Furthermore, procedural irregularities or omissions which would not result in prejudice to the appellant are to be disregarded.

United States v. Nugent, 346 U. S. 1;
Martin v. United States, 190 F. 2d 775;
Atkins v. United States, 204 F. 2d 269.

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[1]"Tr." refers to "Transcript of Record."

VI.

CONCLUSION.

Appellant was properly classified in Class 1-A by the Local Board.

Reopening of appellant's classification by the Local Board was not a denial of due process and is provided for in the Selective Service Regulations.

Appellant was afforded all his rights under the Universal Military Training and Service Act.

It is, therefore, respectfully submitted that the judgment of conviction should be affirmed.

Respectfully submitted,

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No. 13941

United States Court of Appeals

FOR THE NINTH CIRCUIT.

CHARLES WILLIAM AFFELDT, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

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No. 13941

United States Court of Appeals

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Appellee.

REPLY BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

MAY IT PLEASE THE COURT:

Rather than repeat here the information appearing in reply briefs in the companion cases of *Basil Leroy Sterrett* v. *United States of America,* No. 13901; *John Alan Tomlinson* v. *United States of America,* No. 13892; and *Clair Laverne White* v. *United States of America,* No. 13893, filed in this Court, references will be made to those briefs.

I.

The appellee argues, at page 7 of its brief, that the conscientious objector status is granted only to those who qualify. The record in this case shows that Affeldt qualified for the conscientious objector status. There was no evidence to dispute what he submitted. — *Annett* v. *United States,* 205 F. 2d 689 (10th Cir. June 26, 1953); *Dickinson* v. *United States,* 346 U. S. 389, 74 S. Ct. 152; *United States* v. *Pekarski,* 207 F. 2d 930 (2d Cir. Oct. 23, 1953); *Schuman* v. *United States,* — F. 2d — (9th Cir. Dec. 21, 1953); *Jewell* v. *United States,* — F. 2d — (6th Cir. Dec. 22, 1953); *Taffs* v. *United States,* 208 F. 2d 329 (8th Cir. Dec. 7, 1953); *United States* v. *Hartman,* — F. 2d — (2d Cir. Jan. 8, 1954); *United States* v. *Benzing,* No. 5862-C, Western District of New York, January 15, 1954; *United States* v. *Lowman,* No. 6093-C, Western District of New York, January 15, 1954.

II.

The appellee argues, at pages 7-8 of its brief, that it is the duty of the boards to classify and the burden rests on the registrant to establish eligibility therefor. This is true as far as it goes. The appellee does not go far enough. The fact of the matter is, if there is no basis in fact for the denial of the exemption, the classification is invalid. See further answers to this argument under Point II of the *Sterrett* reply brief and under Point III of the *White* reply brief filed in this Court.

III.

The statement is made by appellee, on page 9 of its brief, that the Selective Service file indicates basis in fact for the denial of the conscientious objector status. No citation to any part of the file is made. This should be rejected because there is no reference to support it. This also applies to the statement appearing on page 11 of appellee's brief, where it is said that the questions and answers given by a registrant are the basis for denial of the conscientious objector classification.

IV.

The appellee argues, on page 13 of its brief, that because Affeldt informed the board that he would not accept work of national importance this was basis in fact alone for the denial of the conscientious objector status.

It should be noted that nowhere in the record did the appellant state that he was not a conscientious objector. The record shows to the contrary. It is true that he was also seeking, without merit, the exemption given to ministers of religion under the law. But the fact that he relied on his arguments and insisted on the groundless claim for the ministerial exemption as a basis for stating his refusal to do work of national importance did not warrant the denial of the conscientious objector status.

The first and main fallacy of the argument of the appellee is that it ignores the fact that the jurisdiction of the draft boards is limited to classification and issuance of orders for participation in service based on classification. The boards do not have the authority to penalize a registrant or make a determination that flies in the teeth of the facts of record just because the registrant says he will not accept the service or work obliged by the classification. That a registrant declares he will not accept the work or service ordered by the board is no basis in fact to the board or authority for it to say that he is not a conscientious objector. His objections may go farther than the law allows and be conscientious. His penalty is punishment for refusal to do work, not be ordered into the armed forces. That he has objections to the performance of the work does not spell that he is not a genuine conscientious objector. It does not mean that he can be classed as liable for military service. It merely means that, as a genuine conscientious objector, he objects to the work assigned to him. His objection to the work assignment and refusal to do it does not contradict what he said in his papers about being a conscientious objector. It is no basis for the denial of the claim.

Let this argument be emphasized by an analogy. Suppose all black-headed men should do military service and the law said that in lieu of induction into the armed forces all red-headed men should be ordered to do civilian work. Assume that a red-headed man answered in his questionnaire that he was red-headed. Also suppose that the undisputed evidence showed him to be red-headed. His answer would not be proved false or said to be without basis in fact purely because he stated further that he refused to do work of national importance. He still would be red-headed and it would still be the duty of the board to keep him in the red-headed classification. It would not justify taking him out of the red-headed classification and putting him in the classification given to black-headed men simply because he said he would not do the service ordered for red-headed men.

In *United States* v. *Liberato,* 109 F. Supp. 588 (W. D. Pa.), it was held that a registrant could not be ordered inducted into military service because he stated to the board that he wanted the opportunity to decide whether he could accept the work selected by the board. The same principle applies here. The status of appellant as a conscientious objector still remained, notwithstanding his statement that he would not accept work of national importance.

The only legal authority that the board had was to classify appellant properly on the state of the record. If he was not entitled to the minister's exemption then he should have at least been placed in the conscientious objector status regardless of his statement. Appellant could have then been ordered to do civilian work on a proper classification. Had he then refused to comply with the legal classification and was ordered to do civilian work he could still have been prosecuted for failing to do civilian work. It is just as much a violation of the law to refuse to do civilian work as it is to refuse to do military service.

The sum and substance of this answer to appellee's argument is that the courts are the agency chosen by Congress to enforce the penalties for refusing to obey the law. That

a registrant threatens to violate the law does not warrant the board also to violate the law. It is axiomatic that two wrongs do not make a right. The board is not permitted to violate the law because of a threat to defy a civilian work order. When it violates the law for this reason the courts must enforce the law against the board and put it back in its place of making lawful classifications, not unlawful ones because of the threats of the registrant.

The second and last reason why the appellee's argument of basis in fact on the part of appellant in making the claim is not in point is that the directions from the Selective Service System prohibit the draft boards from denying the conscientious objector status on any grounds of waiver unless the waiver is intelligently and deliberately made in writing. As long as the record shows indisputably that a registrant has made the claim lawfully and has not withdrawn the claim in writing it is beyond the authority of the boards to forfeit the claim for any reason except a denial based on facts showing the registrant not to be a conscientious objector. The only way the board can avoid properly classifying according to the undisputed evidence showing conscientious objections is to get a written waiver from the registrant. See Local Board Memorandum No. 41, issued by National Headquarters of Selective Service System, November 30, 1951, as amended, August 15, 1952. A copy of this memorandum accompanies this reply brief. See also *United States* v. *Knight,* No. 20283, Northern District of Ohio, April 25, 1951; *United States* v. *Stephens,* No. 20284, Northern District of Ohio, April 25, 1951; *United States* v. *Carleton,* No. 6030, Southern District of Ohio, October 24, 1951.

It is respectfully submitted that the argument made by appellee about the conscientious objector claim being waived because appellant stated he would not accept work of national importance should be rejected by the Court.

V.

It is stated by appellee, on page 15 of its brief, that

the claim for the ministerial exemption was considered. The ministerial classification is not involved in this case. The contention at the top of page 15 of appellee's brief is a moot question.

VI.

The argument is made on pages 15-16 of appellee's brief, that the fact that Affeldt is not entitled to be classified as a minister and is not engaged in the ministry as his vocation but is working in a full-time secular activity, is basis in fact for the denial of the classification. Performance of secular work and lack of ministerial status under the law are not relevant to the question of whether the registrant is entitled to the conscientious objector status.—See reply brief in companion case of *Sterrett* v. *United States,* under Part IV.

VII.

The argument is made by the appellee, at pages 17-18 of its brief, that the request of Affeldt for the FBI report was too late. It is said that because he requested the unfavorable evidence at the time of the hearing and not before the date set for the hearing he has waived the right to complain about the error of the trial court in refusing to allow the FBI report to be received into evidence.

The hearing officer did not raise this objection. When the request was made by Affeldt for the unfavorable evidence he attempted to comply with it. Since there was no claim made by the hearing officer that the demand was untimely it is entirely out of order and immaterial to urge here that it was too late. The hearing officer in this case testified in the companion case of *Tomlinson* v. *United States of America,* No. 13892, that it was his practice invariably to give the registrant notification of the unfavorable evidence appearing in the file even when it was not requested.—See reply brief in the *Tomlinson* case, Part VIII.

The requirement that the request be made before the date set for the hearing is a requirement that can be waived by the hearing officer. Since the hearing officer did not insist on the timely request but undertook to comply with it, notwithstanding its being late, the appellee is in no position to argue that the request was not timely and for that reason the failure to allow the FBI report to be used as evidence is harmless error.

The secret investigative report should have been received into evidence at the trial.—*United States* v. *Nugent,* 346 U. S. 1; *United States* v. *Evans,* 115 F. Supp. 340 (D. Conn. Aug. 20, 1953); *United States* v. *Stull,* Cr. No. 5634, Eastern District of Virginia, November 6, 1953; *United States* v. *Brussell,* No. 3650, District of Montana, November 30, 1953; *United States* v. *Parker* and *United States* v. *Broadhead,* Nos. 3651, 3654, District of Montana, December 2, 1953; *United States* v. *Staserie,* No. C. 142-143, Southern District of New York, December 17, 1953.

VIII.

The appellee argues that the failure to receive the FBI report into evidence is harmless error. This argument is contrary to *Kotteakis* v. *United States,* 328 U. S. 750. It is answered further in the reply brief for Tomlinson, under Part X.

CONCLUSION

It is submitted that the judgment of the court below should be reversed and the appellant ordered acquitted.

Respectfully,

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No. 13942

United States Court of Appeals

FOR THE NINTH CIRCUIT.

CHARLES SIMON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

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No. 13942

United States Court of Appeals

FOR THE NINTH CIRCUIT.

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Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

JURISDICTION

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Southern District of California, Central Division. [4-6][1] The district court made no specific findings of fact. These

[1] **Numbers appearing in "brackets" herein refer to pages of the printed Transcript of Record filed herein.**

were waived. [8-9] The court stated no reasons for the judgment rendered. [41-42] The trial court found the appellant guilty. [41-42] Title 18, Section 3231, United States Code, confers jurisdiction in the district court over the prosecution of this case. The indictment charged an offense against the laws of the United States. [3-4] This Court has jurisdiction of this appeal under Rule 37 (a) (1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law. [6-7]

STATEMENT OF THE CASE

The indictment charged appellant with a violation of the Universal Military Training and Service Act. It was alleged that after appellant registered and was classified he was ordered to report for induction. It is then alleged that on or about July 31, 1952, appellant "knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do." [4]

Appellant pleaded not guilty and waived the right of trial by jury. Findings of fact and conclusions of law were also waived. [8-9]

Appellant subpoenaed the production of the secret FBI investigative report made pursuant to Section 6(j) of the act. The Government produced the FBI report at the trial. It was offered into evidence. It was excluded on objection from the Government. The court examined it *in camera,* found it to be material and sustained the privileges by the Attorney General under Order No. 3229. [30-38, 39] At the close of the evidence the motion for judgment of acquittal was made. [10-12, 39-40] The motion for judgment of acquittal was denied. [41-42] Appellant was found guilty. [41-42] He was sentenced to serve a period of four years in the custody of the Attorney General. [4-6] Notice of appeal was timely filed. [6-7] The transcript of the record (including statement of points relied upon) has been timely filed in this Court.

THE FACTS

Charles Simon was born on August 16, 1931. (1)[2] He registered with his local board on August 18, 1949. (2) The board mailed a classification questionnaire to him. (3)

The questionnaire was properly filled out by Simon and filed with the local board. (4) He showed his name and address. (5) In answer to one of the questions appearing in Series VI, he said that he did not regularly serve as a minister. (6) He stated that he was a minister of Jehovah's Witnesses and of the Watchtower Bible and Tract Society. He said that he had been such since June 13, 1939. He said that he was ordained on August 20, 1940, at Elkhart, Indiana. (6)

Simon also stated that he was a full-time college student. He showed that he was going to the Compton Junior College. (7, 9) He said that he was majoring in printing and art. (9) He said that he expected to get a diploma and degree in February, 1953. (9)

Appellant signed Series XIV. In this section of the questionnaire he asked the local board to send to him the special form for conscientious objector because he was conscientiously opposed to participation to war in any form. (10) At the conclusion of the questionnaire he claimed classification in Class IV-E. (10)

In the questionnaire he also referred to attached statements supporting his position as a conscientious objector. He signed the questionnaire in the manner required by law. (10)

In the letter referred to in the questionnaire he stated he was asking for the conscientious objector classification of Class IV-E. (12-13) He said that he had been seriously studying the Bible at an early age and that he had been reared in the faith by his parents. He said that he relied

[2] **Numbers appearing in "parentheses" herein refer to pages of the draft board file that are written in longhand at the bottom of each page and circled.**

completely upon the Bible. He then explained extensively that God proposed to vindicate his name and prove the Devil to be a liar before all mankind. He said that because the life was in the blood he could not take blood. He emphasized that he relied on the Ten Commandments. (12)

He said that he was opposed to both combatant and noncombatant military service and that he had pledged his life to Jehovah God. He showed that his weapons of warfare were not carnal. He concluded with the statement that he was not making the claim in order to dodge the draft but because he placed God above man. (12)

The local board, on October 10, 1950, mailed to Simon a special form for conscientious objector. (11) He properly filled out the conscientious objector form and returned it to the local board. It was filed on October 8, 1950. (17) He signed Series I (B). (18)

He answered that he believed in the Supreme Being. He then described the nature of his beliefs showing that his beliefs were deep-seated and that they involved duties to God that were higher than those that he owed to the state. He showed that this belief had come about through serious study of the Bible. He referred to a separate paper. In this paper he quoted extensively the Scriptures. (20) He said that he was seeking God's kingdom first and that he was not seeking any kingdom of this world as a means of salvation.

He said that he was conscientiously opposed to participation in war in any form. He said that if he did he would be a friend of the world. He then added that to be a friend of the world was to be an enemy of God. (20-21) He then showed that he could not serve two masters. (21)

He was asked how it was that he came to get the opinions that he had as a conscientious objector. He said that he had these opinions that obligated him to serve God since the age of nine. He added that he believed in the Supreme Being and that such was Jehovah God. He said that he had learned this through the study of the holy Bible together

with Watchtower publications that aided him in Bible study. (19)

In answer to the question as to whom he relied upon he said that he relied upon the Bible and the Watchtower for guidance. (19)

He answered that he did not believe in force or the use of force except under circumstances where Jehovah God permitted it. (19) He then stated that his service as a witness of Jehovah explaining to others about God's kingdom conspicuously demonstrated the consistency and depth of his conviction as a conscientious objector. (19)

Simon then listed the schools that he had attended. He did not list any employers. He merely added that he had been a part-time clerk. (19) He gave the list of the addresses where he had lived. (23) He named his parents. He then added that each was a Jehovah's Witness. (23) He said that he had never been a member of a military organization. (23).

He said that he was a member of a religious organization. He pointed out that the Watchtower Bible and Tract Society was the legal governing body of Jehovah's Witnesses, the group to which he belonged. (23) He said that he became a member of that organization in 1939 by and through home Bible study. (23) He listed the church located at Compton, California, that he had attended. He showed that Mr. Lyon was the presiding minister of the church. (23)

Simon then referred to a clipping from the *Watchtower* magazine for a description of the nature of the beliefs of the organization on opposition to war. (23) He then referred to the attached *Watchtower*. (22) In this he had underscored the following: "For this neutral position toward the deadly conflicts of this old world and for their Christian devotion and allegiance to God's New World government by his Son Jehovah's Witnesses are hated by all nations and suffer persecution at the hands of the religious friends of the old world." (22)

Simon listed a number of persons as references. He then signed the conscientious objector form. (24) He attached a certificate by Glenn Mounce, showing that he attended regularly the meetings of Jehovah's Witnesses and engaged in the house-to-house preaching work of Jehovah's Witnesses. (25) Robert Merriott, Sam Cook, H. B. Robbins, and E. R. Vanice also signed certificates that were attached to the special form for conscientious objector. (26-30)

The local board, on October 26, 1950, classified Simon in Class I-A. He was notified of this classification. (11) He wrote a letter to the board reminding it of his claim for classification as a conscientious objector. In this he requested a personal appearance. (11) This was filed with the local board. (11)

Simon then filed with the local board a letter from the dean showing that he was a full-time student at the Compton Junior College. (11)

On December 8, 1950, he was notified to appear on December 13, 1950. (11, 35) On that date he appeared. A memorandum was made. (11, 36)

Simon testified about his personal appearance. [13-26] He said that he went to the board for the purpose of discussing his classification. He wanted to show to the board the meaning to him and the importance of the obligation that was imposed upon him by certain scriptures that he had cited in his papers. He wanted to discuss this. (13-14) He tried to discuss this material but was not permitted to do so. (14) He told the board at the hearing that the basis of his conscientious objection was home training. He opened his Bible and tried to give evidence as to why he could not participate in war. The board said that it was unnecessary for him to do this. They said that they "were not interested in what I believed." [21]

The local board informed him that that would be all and that he would receive notice of their decision after the hearing. [22]

He testified that he attempted to read but was denied

the opportunity to read aloud to the board. [24] He said that he was prepared to give them information to "impress on their minds the importance of these scriptures" that he had already put in his file and also that he was prepared to explain what "they may have overlooked." He wanted to show the importance and explain things if they had "misunderstood what my feelings were." [25] He said when he attempted to do this he was cut short and denied the right to explain or discuss these things with the board. [26]

The memorandum of the local board merely showed that Simon said "it is against his belief" to go into the armed services. The memorandum then stated that it was the unanimous opinion of the board that he be "continued in Class I-A." (36)

Simon filed a letter with the local board upon the personal appearance. It was in writing. He showed in this that his undivided allegiance belonged to Jehovah God. (37) He said that if the law of man conflicted with the law of God that God's law was to him supreme. (37) He showed that all nations of the world were defiled but that God's nation or kingdom was clean. (37) He indicated that he believed the law of God forbade him to shed blood and that if he were to kill he would be killed by God. (37) He said that he would not conform to the world. He showed that he would have to devote his life to God until death, because his life belonged to God and he had to be pleasing to God. (38)

Appellant, on December 19, 1950, wrote a letter to the local board appealing his classification. (40) This was filed with the board. He was then ordered to take a preinduction physical examination and he was found acceptable for military service. (11, 43) His file was forwarded to the board of appeal. (11, 44) The appeal board made a preliminary determination that he was not entitled to the conscientious objector classification. (11) This entry in the minutes caused the file to be forwarded to the Department of Justice. (49) The Department of Justice received the file on November 5, 1951.

After the file was received by the Department of Justice there was an investigation conducted by the FBI on the sincerity of Simon's conscientious objections. The Department of Justice made a report following the completion of the investigation. This report was sent to the district attorney. The district attorney then forwarded it to the hearing officer of the Department of Justice. The hearing officer used the report of the Department of Justice when Simon appeared before him at the hearing. [31-32]

Simon wrote a letter to the hearing officer when he received notice from the hearing officer that he was entitled to unfavorable evidence. [26] The hearing officer wrote Simon a letter and told him that the unfavorable evidence would be made available to him at the hearing. [26-27] Simon went to the hearing and all the time was expecting to have the adverse evidence called to his attention as the hearing officer had told him. The hearing officer, however, did not inform him of any of the unfavorable evidence in the secret investigative report of the FBI. [37] Simon said that the hearing officer had written him that he would make it available to him, and Simon said, "I expected that he would, but the information was not presented to me." [26-27]

Simon said that at the hearing he did not ask for the adverse evidence orally, because he had previously done this by letter and that the hearing officer had answered by letter that it would be given at the hearing. [30]

The hearing officer, on March 11, 1952, made his report to the Department of Justice. It was very brief. He found that Simon had attended Compton Junior College one year. He said that Simon worked on Sunday when it was necessary. He believed that he had a right to protect his mother and brother by force, if necessary, and that if he did he would be forgiven by God. He found Simon believed in God's law being superior to man's law. The hearing officer then recommended that Simon should be "placed in noncombatant service to wit, classed as I-A-O." (54)

The report of the hearing officer was sent to Washington.

The Special Assistant to the Attorney General wrote a letter to the appeal board adopting the report and recommendation of the hearing officer. He found that Simon should be placed in Class I-A-O and made liable for noncombatant military service in the armed forces. (50) The appeal board classified Simon in Class I-A-O and notified him of it. (11) He was ordered to report for induction on July 31, 1952. (11, 58) Simon reported at the induction station and refused to be inducted. (62)

QUESTIONS PRESENTED AND HOW RAISED

I.

The undisputed evidence showed that appellant possessed conscientious objections to participation in both combatant and noncombatant military service. He showed that these objections were based upon his sincere belief in the Supreme Being. He showed that his obligations to the Supreme Being were superior to those owed to the Government. He showed that his beliefs were not the result of political, philosophical, or sociological views but that they were based solely on the Word of God. (17-24)

The local board placed him in Class I-A. (11) Following personal appearance he was continued in Class I-A. (11) On appeal following an investigation and hearing in the Department of Justice he was placed in Class I-A-O (11) A secret investigation was conducted by the FBI and a report thereof placed in the hands of the hearing officer. [31-33] (52)

Simon was called for a hearing. After the hearing the hearing officer recommended that he be classified as a conscientious objector, qualified to do limited military service as a noncombatant soldier. (54) The Department of Justice followed the recommendation that was submitted to the appeal board. (50) The appeal board classified Simon in Class I-A-O. (11)

In the motion for judgment of acquittal it was contended

that the classification was without basis in fact and that it was arbitrary and capricious. [10] It was also contended that the recommendation and report of the hearing officer to the Department of Justice was illegal. [11] The motion was renewed at the close of the case and denied. [39, 41-42]

The question presented here, therefore, is whether the denial of the claim for classification as a conscientious objector was without basis in fact and whether the recommendation of the hearing officer, adopted by the Department of Justice, and the classification given to appellant by the appeal board were arbitrary, capricious, illegal and without basis in fact.

II.

Simon was granted a personal appearance. (11, 35) He appeared and attempted to give testimony. He wanted to explain how his conscience was molded by the Scriptures and what they meant to him as a conscientious objector to the performance of military service. He attempted to quote and read from the Bible in support of his conscientious objection. The local board members cut him off and stated that they were not interested in what he believed. [13, 14, 21, 25] The local board cut him short when he attempted to discuss the depth of his convictions and the consistency of his life as a conscientious objector. [26]

In the motion for judgment of acquittal it was contended that Simon was denied the right to discuss his classification and that he was cut off from exercising his rights upon personal appearance by the local board. [39-40] The motion for judgment of acquittal was denied. [41-42]

The question presented here, therefore, is whether Simon was denied the right to a full and fair hearing upon personal appearance and not permitted to exercise the rights guaranteed to him by Section 1624.2(b) of the Selective Service Regulations.

III.

The conscientious objector claim of appellant was referred to the Department of Justice for appropriate inquiry and hearing. (52) A complete investigation was made by the FBI before the case was referred to the Department of Justice for a hearing. (52) [31-32]

At the hearing the hearing officer had the secret FBI investigative report before him and used it in making his recommendation to the Department of Justice. [31-32]

Before the hearing Simon wrote a letter to the hearing officer for the adverse information or evidence that he had against him. [26] The hearing officer wrote Simon a letter and told him that he would make available the adverse information that he had when he had his hearing. [26-27]

At the hearing the officer did not advise Simon of any adverse evidence or information, as he had promised to do in his letter. [37]

At the trial appellant subpoenaed the FBI report. The Government supplied the FBI report to the court but objected to its being received into evidence. [30-32, 33] Objection was made to the introduction of the FBI report when it was offered by the appellant. [33] The trial court found the FBI report to be relevant, but excluded it on the grounds that it was confidential and that its exclusion was commanded by Order No. 3229 of the Attorney General. [33-34]

It was stipulated that the appellant sent a request for such information by letter to the hearing officer before the hearing. [34] It was further stipulated that the appellant was entitled to receive from the hearing officer, before the commencement of the hearing, adverse evidence and that none was given to him upon the occasion of the hearing. [35] The appellant was denied the right to use the FBI report to determine whether or not the hearing officer had given him a fair and adequate summary of the adverse information appearing in the secret investigative report of the FBI.

The question presented here, therefore, is whether appellant was denied the right to have and to use the FBI

report upon the trial to test and to determine whether or not the summary made by the hearing officer was a full and fair and adequate summary as required by the due process clause of the Fifth Amendment, the act and the regulations.

SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motion for judgment of acquittal duly made at the close of all the evidence.

II.

The district court erred in convicting the appellant and entering a judgment of guilt against him.

III.

The district court committed reversible error in refusing the appellant the right to use the secret FBI investigative report at the trial as evidence to determine whether the summary of the adverse evidence given to the appellant by the hearing officer of the Department of Justice was fair and adequate as required by due process of law, the act and the regulations.

SUMMARY OF ARGUMENT

POINT ONE

The board of appeal had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant, and it arbitrarily and capriciously classified him in Class I-A-O.

Section 6(j) of the act (50 U. S. C. App. § 456(j), 65 Stat. 83) provides for the classification of conscientious objectors. It excuses persons who, by reason of religious

training and belief, are conscientiously opposed to participation in war in any form.

To be entitled to the exemption a person must show that his belief in the Supreme Being puts duties upon him higher than those owed to the state. The statute specifically says that religious training and belief does not include political, sociological or philosophical views or a merely personal moral code.

Section 1622.14 of the Selective Service Regulations (32 C. F. R. § 1622.14) provides for the classification of conscientious objectors in Class I-O. This classification carries with it the obligation to do civilian work contributing to the maintenance of the national health, safety, or interest.

The undisputed evidence showed that the appellant had sincere and deep-seated conscientious objections to participation in war. These objections were to both combatant and noncombatant military service. These were based on his belief in the Supreme Being. His belief charged him with obligations to Almighty God superior to those of the state. The evidence showed that his beliefs were not the result of political, sociological, or philosophical views. He specifically said they were not the result of a personal moral code. The file shows without dispute that the conscientious objections were based upon his religious training and belief as one of Jehovah's Witnesses. The board of appeal, notwithstanding the undisputed evidence, held that appellant was not entitled to the conscientious objector status.

The denial of the conscientious objector classification is arbitrary, capricious and without basis in fact.—*United States* v. *Alvies,* 112 F. Supp. 618; *Annett* v. *United States,* 205 F. 2d 689 (10th Cir.); *United States* v. *Graham,* 109 F. Supp. 377 (W. D. Ky.); *United States* v. *Pekarski,* — F. 2d — (2d Cir. Oct. 23, 1953); *Taffs* v. *United States,* — F. 2d — (8th Cir. Dec. 7, 1953).

POINT TWO

The appellant was denied the right to a full and fair hearing upon the occasion of the personal appearance before the local board in that he was denied the right to discuss his classification and offer new and additional evidence to the board.

Section 1624.2(b) of the Selective Service Regulations gave appellant the right to discuss his classification, point out parts of the file that he thought the board had overlooked and to offer new and additional evidence.

Simon, at his personal appearance, was cut off. The board denied him the right to discuss his ministerial status by reference to the Bible, which he relied upon as his authority. He wanted to prove his ordination to be the same as that which the Lord Jesus relied upon.

Simon was denied the right, therefore, to discuss his classification and give new and additional evidence upon his personal appearance. The conduct of the board was in violation of the regulations. He was denied due process of law.—*United States* v. *Laier,* 52 F. Supp. 392 (N. D. Calif. S. D.); *Davis* v. *United States,* 199 F. 2d 689 (6th Cir.); *Bejelis* v. *United States,* 206 F. 2d 354 (6th Cir. 1953).

Therefore the judgment ought to be reversed because the trial court erred in overruling the motion for judgment of acquittal containing this complaint concerning the denial of appellant's right to procedural due process of law.

POINT THREE

The court below committed reversible error when it refused to receive into evidence the FBI report and excluded it from inspection and use by the court and the appellant upon the trial of this case.

Upon the trial appellant subpoenaed the secret investigative report of the FBI. A motion to quash was made by the Government. This was denied. At the trial the court

permitted the report to be marked for identification and received as a sealed exhibit after the trial court made an inspection of the exhibit. The trial court found the secret FBI report to be material but refused to permit it to be used as evidence.

The trial court committed grievous error when it refused to permit the exhibit to be used as evidence. It merely received the exhibit and permitted it to be marked for indentification, and the court alone inspected it. The court excluded it and permitted the exhibit to come before this Court in sealed form for the limited purpose of determining whether it was in error in excluding the exhibit.

No claim of privilege is applicable here. The Government waived its rights under the order of the Attorney General, No. 3229, when it chose to prosecute appellant in this case. The FBI report was found to be material by the trial court. The judicial responsibility imposed upon the trial court to determine whether a fair and just summary was required to be given to the appellant overcomes and outweighs the privilege of Order No. 3229 of the Attorney General.—See *United States* v. *Andolschek,* 142 F. 2d 503 (2d Cir.); *United States* v. *Krulewitch,* 145 F. 2d 87 (2d Cir.); *United States* v. *Beckman,* 155 F. 2d 580 (2d Cir.); *United States* v. *Cotton Valley Operators Committee,* 9 F. R. D. 719 (W. D. La. 1949).

The Government must be treated like any other legal person before the court. It has no special privileges, as the king did before the Stuart judges in England.—*Bank Line* v. *United States,* 163 F. 2d 133 (2d Cir.).

The secret investigative report was material. The trial court could not discard its judicial function in determining whether a full and adequate summary had been made of the secret investigative report without receiving the secret report into evidence and comparing it with the summary made by the hearing officer.—*United States* v. *Nugent,* 346 U. S. 1; *United States* v. *Evans,* 115 F. Supp. 340 (D. Conn. Aug. 20, 1953).

It is respectfully submitted, therefore, that the trial court committed error in excluding the FBI report from evidence and depriving appellant of the use of it upon the trial to ascertain whether the hearing officer made a full and fair summary of the secret FBI investigative report.

ARGUMENT

POINT ONE

The board of appeal had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant, and it arbitrarily and capriciously classified him in Class I-A-O.

The question to be determined under this point is whether the denial of the conscientious objector status by the board of appeal is without basis in fact and whether the recommendation of the Department of Justice and the final classification are illegal, arbitrary and capricious. This point has been extensively argued in the briefs for appellants filed in the cases of *Batelaan* v. *United States,* No. 13,939, at pages 14-35, and *Francy* v. *United States,* No. 13,940, at pages 16-22, on the docket of this Court. Reference is here made to the arguments appearing in those cases at the pages above referred to. Especial attention is called to that part of the argument in the brief in the *Francy* case where the inconsistency of the I-A-O classification for the registrant claiming the I-O classification is made.—See pages 20-21 of the *Francy* brief for this particular discussion.

The denial of the conscientious objector status is without basis in fact and the I-A-O classification and the recommendations of the Department of Justice that it is based upon are illegal, arbitrary and capricious.

POINT TWO

The appellant was denied the right to a full and fair hearing upon the occasion of the personal appearance before the local board in that he was denied the right to discuss his classification and offer new and additional evidence to the board.

Section 1624.2(b) of the Selective Service Regulations gave appellant the right to discuss his classification, point out parts of the file that he thought the board had overlooked and to offer new and additional evidence.

The testimony of Simon is undisputed that upon the occasion of his personal appearance he attempted to argue his ministerial status by citing and quoting from the Bible. His testimony was that the local board refused to allow him to testify or discuss his case. When he attempted to discuss his classification, point out facts in the file that the board had overlooked and submit new and additional evidence, he was stopped. He was denied the right to a full and fair hearing.

The Government failed to call the board members to contradict, or attempt to contradict appellant. It failed to ask the clerk any questions to dispute what appellant said. This makes the evidence undisputed. It has been held that the failure to call a witness available to the Government or to introduce evidence available to the Government gives rise to the presumption that the evidence would be adverse to the Government. The Supreme Court said it would be presumed that it would corroborate the testimony of the defendant in criminal proceedings. (See *United States* v. *Di Re*, 332 U. S. 581, at page 593.) It is indisputably established, therefore, that he was denied a full and fair hearing.

Section 1624.2(a) of the regulations provides that the registrant "shall have an opportunity to appear in person before the member or members of the local board designated for the purpose." 32 C. F. R. § 1624.1(a) (page 801)

Section 1624.2(b) of the regulations provides:

> "At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary."—32 C. F. R. § 1624.2(b) (pages 801-802).

Section 1624.2(b) provides that the local board "may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary." However, in this case the local board did not impose any time limitation. The board denied the registrant the right to discuss his classification.

It is true that the appellant told the board that he was prepared to discuss his case and give new and additional testimony. This did not in any way justify the board in cutting him off completely.

The board did not allow him to argue his case. They did not give him a chance to discuss his classification. They refused him the right to go through his file and point out information that he believed the board had overlooked or had not given sufficient weight. There was no hearing. Appellant appeared and stated that he was dissatisfied with his classification because he was a minister exempt from service, but that does not constitute a full and fair hearing. A full

hearing means a complete one. The appellant was denied this right. It was vital and important that the board give him a chance to argue his case. He did not get it. He was prejudiced and injured by the action of the board.

It cannot be said that the denial of the full and fair hearing is harmless error. The board may have granted to the appellant a proper classification or at least one that he would consider satisfactory. We cannot speculate over the failure and conclude that the classification would not have been changed had the board followed the regulations.

The cases are uniform that where a registrant has been denied a full and fair hearing upon a personal appearance there is a denial of procedural due process.—*Knox* v. *United States,* 200 F. 2d 398 (9th Cir. 1952); *Davis* v. *United States,* 199 F. 2d 689 (6th Cir. 1952); *Bejelis* v. *United States,* 206 F. 2d 354 (6th Cir. 1953).

In *United States* v. *Romano,* 105 F. Supp. 597 (S. D. N. Y. 1952), the defendant was acquitted because the local board denied the defendant's request for a personal appearance on the ground that he had previously had a hearing before the first classification. The court held that the regulations contemplated a personal appearance following classification so that the registrant could appear before the board, argue his classification and contest the ruling made by the local board. Judge Kaufman said:

> "I do not intend to lose myself in conjectures of what might have happened had defendant had his post-classification hearing for, indeed, this would be out of the realm of reasonableness. It is sufficient to the disposition of the case before me that I find as a matter of law that defendant was deprived of the right which belongs to every citizen, due process of law. . . .
>
> "Defendant here had absolutely no opportunity to argue his classification which Part 1624 provides him as a matter of law. Once being aware of the board's position after he had been classified

> I-A-O he had a right to appear, make a statement, and point out to the board where he believed they erred and what he believed they overlooked. It cannot be said that in dealing with a subject such as the religion of Jehovah's Witnesses, an oral dissertation might not be of aid to both registrant and the board. What subsequently happened to the various appeals in his case cannot, in the absence of this hearing, be taken to reflect a full and fair disposition of the case at every level of the Selective Service System. . . .
>
> "The thrust of 32 CFR 1624 is completely in the direction of post-classification hearings for all Selective Service registrants. I find that in being denied such a hearing, the defendant has been deprived of due process of law."

In *United States* v. *Laier,* 52 F. Supp. 392 (N. D. Calif. S. D. 1943), the defendant was acquitted because the local board refused a request for an opportunity to appear in person. In that case Judge St. Sure said:

> "From the above provisions it clearly appears that the registrant is entitled to a hearing as a matter of right. And it is settled law that such a personal hearing is a part of due process of law in such proceedings. . . .
>
> "It is also apparent that the application for an opportunity to be heard actually suspends the classification of the registrant, who after such hearing must be reclassified 'in the same manner as if he had never before been classified,' and that he may not be inducted until ten days after he receives the new notice of classification.
>
> "Admittedly, the local board failed to comply with those provisions, and the effect of such failure would seem to be that the registrant was not classified at all, nor could he legally be inducted, at the

time it made its order. In issuing its order, the board acted entirely outside its jurisdiction and without any legal authority.

"The Government further contends that the appeal by registrant to the Board of Appeal cured any error that the local board may have committed. It is urged that because the defendant furnished the appeal board with all the information that he might have presented at a hearing before the local board he was not prejudiced.

"The fact that the Board of Appeal sustained the classification made by the local board in no way lent legality to its erroneous procedure. Defendant was entitled under the Regulations and as part of due process of law to make a personal appearance. As well might it be said that an accused who was incarcerated during a criminal trial but permitted to submit a written statement of his case to the jury was not prejudiced by the denial of his right to personally appear in court and present his case."

Another case in point is *United States* v. *Peterson,* 53 F. Supp. 760 (N. D. Cal. S. D. 1944). In that case the defendant appeared for the personal appearance. The board members made him wait on the outside of the conference room of the board. The board then reviewed his file and reconsidered his case while the registrant was sitting on the outside. He was deprived of the right to discuss his classification or point out things in the file that he wanted to call to the attention of the board. In granting the motion to dismiss the court said:

"The Government argues that the facts in this case differ from those in the *Laier* case because in the *Laier* case the request for personal appearance was denied, but here the board actually discussed defendant's classification while he waited in an

> outer office. Such discussion out of the presence of registrant did not constitute substantial compliance with the regulation permitting a personal appearance. . . . The further argument is made that defendant waived his original request for an appearance because of his failure to insist on it, and because of the clerk's testimony that when she gave him the board's message he appeared satisfied. It was not defendant's duty to insist on his right to appear. It was the duty of the board, if he made a proper request (which is undisputed), to grant him a hearing; and if it did not do so it was acting outside the scope and contrary to the terms of the Act and Regulations."

Judge St. Sure then ordered the defendant dismissed, stating:

> "The motion taken by the local board was not within the framework of the Act set up to protect the registrant, for it was without authority to classify a registrant who requested a personal hearing, without granting him such hearing." —*United States* v. *Peterson,* 53 F. Supp. 760.

It has been held that if there is no hearing, if the evidence is not considered or if the registrant is not given the right to discuss his case, it constitutes a denial of due process of law so as to make invalid the draft board proceedings. (Ex Parte *Stanziale,* 138 F. 2d 312 (3rd Cir.)) If the registrant is not given this right his constitutional liberties are violated. (Compare *United States* v. *Stiles,* 169 F. 2d 455 (3rd Cir.)) The steps to be taken as a condition precedent to induction must be strictly followed. Otherwise the order to report is void. (See *Ver Mehren* v. *Sirmyer,* 36 F. 2d 876 (8th Cir.) "There must be a full and fair compliance with the provisions of the Act and the applicable regulations."—*United States* v. *Zieber,* 161 F. 2d 90 (3rd Cir.).

It is respectfully submitted that this Court should conclude that the draft board proceedings in this case are void because appellant was denied the right to a full and fair hearing upon his personal appearance. The trial court, therefore, committed error in overruling the motion for judgment of acquittal. The judgment of the court below ought, therefore, to be reversed with directions to enter a judgment of acquittal.

POINT THREE

The court below committed reversible error when it refused to receive into evidence the FBI report and excluded it from inspection and use by the court and the appellant upon the trial of this case.

Upon the trial appellant subpoenaed the secret investigative report of the FBI. A motion to quash was made by the Government. This was denied. At the trial the court permitted the report to be marked for identification and received as a sealed exhibit after the trial court made an inspection of the exhibit. The trial court found the secret FBI report to be material but refused to permit it to be used as evidence.

The above point raised in this case is identical in every way to Point Two that is briefed and argued in the case of *Batelaan* v. *United States,* No. 13,939, the case that is a companion to this one. All of the argument made in the brief for *Batelaan* in that case at pages 12 to 13 and pages 36 to 47, applies here. It is hereby adopted and made a part hereof as though copied at length herein. Because these two cases are companion cases and identical in every respect, the Court is hereby requested to read and consider the argument made in the *Batelaan* case that is applicable here.

It is respectfully submitted, therefore, that the trial court committed grievous error in excluding the FBI report in this case. The error was prejudicial to the appellant. The

court should reverse the case and order it remanded so that the appellant can have a full and fair hearing in the trial court as to whether or not there was a fair and adequate summary of the secret FBI investigative report made to Simon at the hearing or whether such summary should have been made by the hearing officer when Simon requested it at the hearing. For this reason the case ought to be reversed and remanded for a new trial.

CONCLUSION

WHEREFORE the appellant prays that the judgment of the court below be reversed and the court ordered to enter a judgment of acquittal; or, in the alternative, appellant prays that the judgment be reversed and the cause remanded for a new trial.

Respectfully submitted,

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December, 1953.

No. 13942.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES SIMON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

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No. 13942.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES SIMON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

I.

Statement of Jurisdiction.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California on September 24, 1952, under Section 462 of Title 50, App., United States Code, for refusing to submit to induction into the armed forces of the United States. [R.[1] pp. 3-4.]

On October 27, 1952, the appellant was arraigned, entered a plea of Not Guilty, and the case was set for trial on November 24, 1952.

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[1]"R." refers to Transcript of Record.

On March 19, 1953, trial was begun in the United States District Court for the Southern District of California by the Honorable William C. Mathes, without a jury, and on April 6, 1953, the appellant was found guilty as charged in the indictment. [R. pp. 4-6.]

On April 6, 1953, appellant was sentenced to imprisonment for a period of four years and judgment was also entered. [R. pp. 4-6.] Appellant appeals from this judgment. [R. pp. 6-7.]

The District Court had jurisdiction of this cause of action under Section 462 of Title 50, App., United States Code, and Section 3231, Title 18, United States Code.

This Court has jurisdiction under Section 1291 of Title 28, United States Code.

II.

Statutes Involved.

The Indictment in this case was brought under Section 462 of Title 50, App., United States Code.

The Indictment charges a violation of Section 462 of Title 50, App., United States Code, which provides, in pertinent part:

> "(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said sction] . . . shall, upon conviction in any district court

of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . ."

III.

Statement of the Case.

The indictment charges as follows:

"Indictment—No. 22509-CD Criminal [U. S. C., Title 50, App., Section 462—Selective Service Act, 1948].

"The Grand Jury charges:

"Defendant CHARLES SIMON, a male person within the class made subject to selective service under the Selective Service Act of 1948, registered as required by said Act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 122, said board being then and there duly created and acting, under the Selective Service System established by said Act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said Act and the regulations promulgated thereunder, the defendant was classified in Class I-A-O, and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the Armed Forces of the United States of America on July 31, 1952, in Los Angeles County, California, in the division and district aforesaid; and at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under said Act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do." [R. pp. 3-4.]

On October 27, 1953, appellant appeared for arraignment and plea, represented by J. B. Tietz, Esq., before the Honorable William C. Mathes, United States District Judge, and entered a plea of Not Guilty to the offense charged in the Indictment.

On March 19, 1953, the case was called for trial before the Honorable William C. Mathes, United States District Judge, without a jury, and on April 6, 1953, the appellant was found guilty as charged in the Indictment. [R. pp. 4-6.]

On April 6, 1953, appellant was sentenced to imprisonment for a period of four years in a penitentiary. [R. pp. 6-7.]

Appellant assigns as error the judgment of conviction on the following grounds:

A. The District Court erred in failing to grant the Motion for Judgment of Acquittal duly made at the close of all the evidence. [App. Spec. of Error 1—App. Br. p. 12.][2]

B. The District Court erred in convicting the appellant and entering a judgment of guilt against him. [App. Spec. of Error—App. Br. p. 12.]

C. The District Court erred in denying the Motion for New Trial. [App. Spec. of Error 3—App. Br. p. 12.]

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[2]"App. Spec. of Error" refers to "Appellant's Specification of Error"; "App. Br." refers to "Appellant's Brief."

IV.

Statement of the Facts.

On August 18, 1949, Charles Simon registered under the Selective Service System with Local Board No. 122, Long Beach, California. [F. 1-2.][3]

On September 25, 1950, the appellant filed with Local Board No. 122, SSS Form 100, Classification Questionnaire. [F. 4-11.] In Series VI he stated he was a minister of religion but that he did not serve regularly as a minister of Jehovah's Witnesses. [F. 6.] He stated he was a full-time student at Compton Junion College, majoring in printing and art. [F. 9.] The appellant signed Series XIV and thus informed Local Board 122 that he claimed exemption from military service by reason of conscientious objection to participation in war. He also requested further information and forms. [F. 10.]

SSS Form 150, Special Form for Conscientious Objector, was furnished to the appellant and he completed this form and filed it with the Local Board on October 10, 1950. The appellant claimed to be conscientiously opposed to participation in war in any form, by reason of his religious training and belief. [F. 18-24.]

On October 26, 1950, the appellant was classified in Class I-A, and was mailed notice thereof on the same date.

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[3]Numbers preceded by "F." appearing herein within brackets refer to pages of Appellant's Draft Board File, Government's Exhibit No. 1. The pages are numbered in longhand at the bottom of the photostatic copies which identifies the page in the Draft Board file.

On October 31, 1950, the appellant requested a personal appearance before the board and was granted such personal appearance on December 13, 1950. [F. 35-36.]

On December 20, 1950, the appellant filed Notice of Appeal from his classification to the Appeal Board. [F. 40.]

On April 19, 1951, the Appeal Board reviewed the file and determined that the registrant was not entitled to classification in either a class lower than IV-E or in Class IV-E. [F. 49.]

On April 30, 1952, the appellant was classified I-A-O by the Appeal Board, by a vote of 3-0. Form 110, Notice of Classification, was mailed on May 7, 1952, to the appellant.

On July 18, 1952, SSS Form 252, Order to Report for Induction, was mailed to the appellant ordering him to report for induction on July 31, 1952. [F. 58.]

The appellant reported for induction but refused to submit to induction into the Armed Forces of the United States. [F. 62.]

V.

ARGUMENT.

POINT ONE.

The Board of Appeals Had Basis in Fact to Classify the Appellant in Class I-A-O and Its Action Was Neither Arbitrary nor Capricious.

The classification of registrants by Local Boards and Appeal Boards is provided by 50 U. S. Code, App., Section 460, which provides in pertinent part:

> ". . .
>
> "(b) The president is authorized—
>
> "(3) to create and establish . . . civilian local boards, civilian appeal boards, . . . Such local boards . . . shall, under the rules and regulations prescribed by the President, have the power . . . to hear and determine . . . all questions or claims, with respect to inclusion or exemption or deferment from, training and service under this title (said sections), of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe . . . The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President. . . ."

The appeal board has jurisdiction, thus, to hear appeals and classify anew.

32 C. F. R., Sec. 1626.26—Decision of Appeal Board—provides:

> "(a) The appeal board shall classify the registrant, giving consideration to the various classes *in the same manner in which the local board gives consideration thereto when it classifies a registrant,* except that an appeal board may not place a registrant in Class IV-F because of physical or mental disability unless the registrant has been found by the local board or the armed forces to be disqualified for any military service because of physical or mental disability.
>
> "(b) Such classification of the registrant shall be *final,* except where an appeal to the President is taken: Provided, That this shall not be construed as prohibiting a local board from changing the classification of a registrant in a proper case under the provisions of Part 1625 of this chapter." (Emphasis added.)

The classifications of the local boards and later the appeal boards made in conformity with the regulations are *final* even though erroneous. The question of jurisdiction arises only if there is no basis in fact for the classification.

Estep v. United States, 327 U. S. 114;

Tyrell v. United States, 200 F. 2d 8 (9 Cir.).

The Statute granting the exemption reads as follows:

> "Title 50, App., United States Code, Section 456, Deferments and Exemptions from training and service.
>
> "(j) Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of

the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form . . ."

It is necessary, however, for a person who claims exemption from combatant or non-combatant training, to have his claim sustained by his local, or thereafter his appeal board.

Thus, such a registrant must satisfy the Selective Service Board as to the validity of his claim for exemption in the following particulars:

(1) He must be conscienciously opposed to war in any form;

(2) This opposition must be by reason of the registrant's religious belief, and

(3) His religious training;

(4) In addition the character of the registrant, and

(5) The good faith and sincerity of his objections are judged.

If the registrant, or his claim for exemption, fails to satisfy the Selective Service Board in any one of the following particulars, there is a basis in fact for the classification of the Board in refusing the exemption, in whole or in part.

Selective Service Regulations, Section 1622.11 [32 C. F. R. 1622.11] provides:

"§1622.11—Class I-A-O—*Conscientious Objector Available for non-combatant military service only.*

"(a) In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of

religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces.

"(b) Section 6(j) of Title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

" 'Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal code.' "

Selective Service Regulations, Section 1622.14 [32 C. R. F. 1622.14] provides:

"§1622.14—Class I-O—*Conscientious Objector Available for Civilian Work Contributing to the Maintenance of the National Health, Safety, or Interest.*

"(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to both combatant and non-combatant training and service in the armed forces.

"(b) Section 6(j) of Title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

" 'Religious training and belief in this connection means an individual's belief in relation to a Supreme Being involving duties superior to those arising from

any human relation, but does not include essentially political, sociological, or philosophical views or a purely personal moral code.' "

These sections of the Selective Service Regulations define in broad terms the qualifications necessary for classification as a conscientious objector in classification I-A-O and I-O. The application of these descriptions to particular registrants is a duty imposed upon the Local Boards and later the Appeal Boards. The Boards are left to determine how and when a registrant claiming exemption from military service by reason of conscientious objection was to be qualified. The exercise of that discretion, even though it may have been erroneous, is final in the absence of arbitrary or capricious conduct on the part of the Board so classifying a registrant.

Estep v. United States, supra.

To aid the Board in its determination of the conscientious objector claims of registrants, the Selective Service System uses SSS Form 150, Special Form for Conscientious Objectors, in addition to SSS Form 100, Classification Questionnaire. The questions and answers given thereto by a registrant are the basis of a classification by a Board within the broad terms of Selective Service Regulations, Sections 1622.11 and 1622.14. The burden is upon the registrant to maintain and prove his claim within these categories.

United States v. Schoebel, 201 F. 2d 31;
Davis v. United States, 203 F. 2d 853.

The appellant contends that the action of the Appeal Board is arbitrary, capricious and without basis in fact. A reading of the Appellant's Selective Service file indicates the contrary. [F. 53-54.] The Congress of the United States has taken great pains to investigate the conscientious objection claims that have not been sustained by the Local Boards. To this end, Section 6(j) of the Universal Military Training and Service Act [Title 50, App., United States Code, Section 456(j)] requires an inquiry and opportunity for the claimant to be heard in regard to his conscientious objection claims, over and above the personal appearance that the Local Board will grant to its registrants (as was done here). [F. 36.]

It is noted that the appellant's conscientious objections were sustained as to combatant service, though not as to non-combatant military service. Thus, there was a recognition by the Appeal Board of his conscientious objection claims. Furthermore, it is difficult for the hearing officer to be able to put down on paper the reasons for his recommendation to the Appeal Board, because conscientious objection is a state of mind, an intangible item. The hearing officer has an opportunity to hear and observe the registrant, to see the Selective Service files, and allow the appellant to submit new information, written or verbal, to substantiate his claim. It appears that this was done in compliance with the rules and regulations. [R. pp. 29-30.]

POINT TWO.

The Classifications of the Local Board Made in Conformity With the Regulations Are Final if There Is a Basis in Fact for the Decision of the Local Board.

The appellant had opportunity to place a summary of his basis for a claim as a conscientious objector in his SSS Form 150, Form for Conscientious Objector, and the appellant did take advantage of this opportunity. Furthermore, the appellant may at any time mail information in the Local Board and direct that it be placed in his file. The facts appear that appellant took advantage of this opportunity also. [F. 12-17, 25-31.] It appears that the appellant was given a reasonable opportunity to admit new information and the Local Board did look at some of the information before it. The regulations do not require that the Local Draft board consider unlimited unrelated information, nor need it allow the registrant unlimited time in his appearance before them. The appropriate section is Title 32, Code of Regulations, Section 1624.2(b):

> "At any such appearance the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked, or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing, or if oral, shall be summarized in writing, and in either event, shall be placed in the regis-

trant's file. The information furnished should be as concise as possible under the circumstances. A member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary."

Furthermore, the law presumes that the Local Board has done its duty, *Koch v. United States,* 150 F. 2d 762, and procedural errors or irregularities which do not result in prejudice to the registrant are to be disregarded.

POINT THREE.

The Trial Court Committed No Error When It Refused to Receive Into Evidence the Federal Bureau of Investigation Reports and Exclude Same From Inspection and Use by Appellant in This Case.

At the trial the court made an in camera examination of the investigative reports of the Federal Bureau of Investigation, and marked them "Defendant's Ex. B." The Trial Court held that the materiality of the report is slight and that the evidentiary value of the report to the defense is outweighed by the public interest in the preservation of the confidential character of executive communications designated as "confidential" by the executive pursuant to Regulations issued under Section 22 of Title 5, United States Code. [R. pp. 37-38.] It is within the power of the Trial Court to exclude irrelevant, immaterial and incompetent evidence. Furthermore, procedural irregularities or omissions which do not prejudice the defendant (appellant) are to be disregarded.

Martin v. United States, 190 F. 2d 775;
Tyrrell v. United States, supra;
Atkins v. United States, 204 F. 2d 269.

It is submitted that the procedure followed by the Department of Justice in this case was in accord with the leading case in this view, *United States v. Nugent*, 346 U. S. 1, which held that the conscientious objector was not entitled to inspect the investigator's report. [R. pp. 5-6.]

CONCLUSIONS.

The appellant was duly and validly classified by the Appeal Board.

No action of the Local Board was arbitrary or capricious. There was no denial of due process in the classification of the appellant.

There was no error by the District Court in denying the Motion for Acquittal of the defendant.

There was no error by the District Court in entering a judgment of guilt against the defendant.

There was no error by the District Court in denying the Motion for New Trial.

There was no error of law in the rulings of the District Court, and therefore, the conviction should be affirmed.

Respectfully submitted,

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No. 13942

United States Court of Appeals

FOR THE NINTH CIRCUIT.

CHARLES SIMON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

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No. 13942

United States Court of Appeals
FOR THE NINTH CIRCUIT.

CHARLES SIMON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

May It Please the Court:

What has been said in the reply brief for appellant in *Albert Clementino* v. *United States of America*, No. 13918, filed in this Court, will be referred to here rather than repeat what was there said.

I.

Appellee makes the argument, at page 8 of its brief, that the classification by the draft boards is final even

though erroneous. This is not exactly a full statement of the facts. It is true so long as the appellee can show some contradiction or dispute in the administrative record. In the absence of such dispute of fact, it cannot be said that there is a question of fact involved. Since there in no question of fact involved, and the classification is contrary to the facts showing exemption, there is no basis in fact and the draft boards are without jurisdiction.—*Estep* v. *United States,* 327 U. S. 114; *Dickinson* v. *United States,* 346 U. S. 389, 74 S. Ct. 152; *Schuman* v. *United States,* — F. 2d — (9th Cir. Dec. 21, 1953); *Jewell* v. *United States,* — F. 2d — (6th Cir. Dec. 22, 1953); *United States* v. *Hartman,* — F. 2d — (2d Cir. Jan. 8, 1954).

II.

The argument is made by the appellee, at page 9 of its brief, that it is necessary to have the draft boards sustain the claim in order for it to be good. This statement flies in the teeth of the fundamental proposition that if a claim is not sustained and there is no basis in fact for the classification it is invalid.

III.

The appellee argues, at page 9 of its brief, that it is necessary for a registrant to show his character incidental to the conscientious objector claim. The statute does not make the character of the conscientious objector a relevant inquiry. This has been adequately answered in the reply brief in the *Sterrett* case (No. 13901 on the docket of this Court) under Point I.

IV.

The appellee argues, at page 11 of its brief, that the draft boards are free to determine how and when a registrant is qualified for classification as a conscientious objector. This argument must be qualified by the provisions of the act and regulations. If the draft boards act in

defiance of these, then it cannot be said that the boards are left free to determine such questions. The discretion of the boards is limited by law.

V.

At page 12 of its brief the appellee makes the general argument—as it does in the companion cases—that a reading of the Selective Service file indicates that there is basis in fact. The appellee nevertheless fails to refer to any such parts of the file that prove the point relied on. Appellee says that the classification is not shown to be arbitrary and capricious. The I-A-O classification in the face of the conscientious objector form showing opposition to participation in both combatant and noncombatant military service shows definitely that the classification is arbitrary and capricious on its face. For answer to this argument of appellee, see pages 16-22 of main brief in companion case of *James Rolland Francy* v. *United States of America,* No. 13940, filed in this Court.

The fact that the conscientious objector status was sustained only as to combatant military service and he was ordered to do noncombatant military service proves an arbitrary and capricious compromise of the full conscientious objector status contrary to the facts and law.

VI.

It is argued by appellee, at page 12 of its brief, that it is difficult for the hearing officer to put down on paper his reasons for his recommendations, because "conscientious objection is a state of mind, an intangible item." That this is so does not mean that Congress freed the draft boards and the Department of Justice from the rules of law and of reason. It does not give license to administrative officials to defy the law. Unless an administrative officer can give reasons for his decision and base them upon facts he has acted arbitrarily and capriciously. That the conscientious objector status pertains

to the mind of the individual is entirely immaterial and irrelevant. The sole question is: Does the undisputed evidence show that the registrant is a conscientious objector according to the definition appearing in the act? The fact that the hearing officer has difficulty in sustaining his illegal action does not validate the illegality of his action.

VII.

Appellee says, at page 12 of its brief, that the hearing officer had an opportunity to observe the registrant. From this it can be assumed that the contention is that an issue of credibility was present. There is no evidence that the hearing officer doubted the credibility of Simon. Indeed the contrary appears. In the absence of a specific finding that the hearing officer questioned Simon's credibility, it cannot be injected into the case for the first time by way of speculation.—*Dickinson* v. *United States,* 346 U. S. 389, 74 S. Ct. 152; *Schuman* v. *United States,* — F. 2d — (9th Cir. Dec. 21, 1953). See also answer to the argument under Point IX of the reply brief in companion case of *Albert Clementino* v. *United States of America,* No. 13918.

VIII.

Appellee asserts, at pages 13-14 of its brief, that the appellant had the opportunity to mail information to the local board to be placed in his file, and that this right constituted a waiver of any failure to accord procedural due process of law.

It should be remembered that the registrant was denied the right to discuss his classification. This was not cured by his right to write letters. Personal appearance is a vital right. (*Knox* v. *United States,* 200 F. 2d 398 (9th Cir.)) See also answer to the argument under Point VI of the reply brief in the companion *Clementino* case (No. 13918).

CONCLUSION

It is submitted that the judgment of the court below should be reversed and the appellant ordered acquitted.

Respectfully,

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No. 13,947

IN THE

United States Court of Appeals

For the Ninth Circuit

THYS COMPANY, a corporation,
Appellant,

vs.

SOPHIE OESTE, an individual,
Appellee.

APPELLEE'S REPLY BRIEF

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IN THE

United States Court of Appeals

For the Ninth Circuit

THYS COMPANY, a corporation,
Appellant,

vs.

SOPHIE OESTE, an individual,
Appellee.

APPELLEE'S REPLY BRIEF

[References to the record will be found in abbreviated form as (R.) followed by the specific page or pages and the line or lines, whenever line reference is deemed particularly pertinent; references to appellant's Opening Brief will be found in abbreviated form as (Op. Br.) followed by the page or pages.]

PRELIMINARY STATEMENT

The appellee is unable to agree with appellant's statement that the trial court held the Letters Patent involved in this

particular action invalid in toto (although appellee agrees that such should be the case). The appellee is also unable to agree that the appellant's Statement of Points on Appeal (R. 213) presents to this Court for review the issue of infringement of the said Letters Patent (Op. Br. 1). And, the appellee finding the alleged statement of the case by the appellant, commencing on page 3 and concluding on page 20 of its brief, to be in a highly argumentative, rather than a factual form, and further finding that the general presentation (both as to the form and substance) of appellant's entire brief to be confusing, disordered and unintelligible, states as follows:

This appeal is two-fold.

The appellant appeals from a judgment in the United States District Court for the Northern District of California entered June 1, 1953 (R. 40), by the Court sitting without a jury, adjudging claims 18, 19, 21 and 22, of United States Letters Patent No. 2,448,063, issued on August 31, 1948, to E. Thys on an application filed August 28, 1944, to be invalid.

The appellee has appealed from the failure of the trial court to award appellee a reasonable sum for attorneys' fees incurred herein and as prayed for.

STATEMENT OF PLEADINGS AND JURISDICTION

Thys Company, a corporation, the appellant herein, filed suit against the appellee Sophie Oeste, on June 6, 1952 (R. 3) charging infringement by the appellee of claims 18, 19, 21 and 22 of the said Letters Patent, and also alleging that the appellant had given "sufficient notice to the public that said articles are patented by fixing to the packages wherein one or more of them is enclosed a label containing the word 'patent', together with the number of the patent, the char-

acter of the articles being such that said notice could not be fixed to the articles themselves" (R. 4), and the appellant demanded a preliminary and final injunction against further infringement by the defendant * * *, an accounting of damages, judgment for a sum equal to three times the amount of actual damages sustained by the plaintiff, an assessment of costs against defendant, and an award of reasonable attorneys' fees (R. 3-4). Jurisdiction of the District Court was alleged upon U.S. Code Title 28, Section 1338(a) and U.S. Code Title 35, former Sections 67 and 70 (R. 3).

The appellee filed her answer on July 21, 1952, admitting jurisdiction, but denying validity and infringement and inter alia, alleged a file wrapper estoppel, and by way of a special and fourth defense the defense of license, and the appellee also prayed that the appellee be granted and awarded reasonable attorneys' fees for the defense of the action (R. 4-9).

On September 10, 1952, the appellee filed notice of additional defenses, setting forth five additional domestic and one foreign patent to be relied upon by the appellee at the time of the trial (R. 11-13).

The trial of the cause took place on January 13 and 14, 1953 (R. 45) and was submitted following the oral argument had on January 19, 1953 (R. 207-212). Subsequently, on March 4, 1953, the District Court filed its Opinion concluding the claims of the patent in suit to be invalid for want of invention (R. 20-33). The appellee filed her Proposed Findings of Fact and Conclusions of Law and the appellant on March 25, 1953, filed its Amendments and Additions to said Findings of Fact and Conclusions of Law proposed by appellee (R. 44), and thereafter on April 10, 1953, the Court

filed its settled Findings of Fact and Conclusions of Law (R. 33-39).

On June 1, 1953, the District Court filed its Final Judgment adjudging the claims in suit invalid and dismissing the complaint with prejudice; said judgment being entered on June 2, 1953 (R. 40-41).

On June 30, 1953, the appellant filed its Notice of Appeal (R. 40-42) and, on July 1, 1953, the appellee her Notice of Cross-Appeal (R. 42).

The jurisdiction of this Court is based upon U.S. Code, Title 28, Section 1291, and the appeal on the part of the appellant and the cross-appeal on the part of the appellee were taken within 30 days of the entry of judgment of the District Court, pursuant to the provisions of the Federal Rules of Civil Procedure, Rule 73(a).

STATEMENT OF THE CASE

The patent in suit issued to E. Thys, President and Treasurer of the appellant herein, and is entitled "Machine for Stripping Hops from Vines." The patent issued for an alleged combination, which is claimed in the patent specification to reside "in *two* features: one, in the *bar itself* and the other in the *interlocking finger construction*" (R. 219, col. 2:8-10). The object of the patent is stated to be "to provide improved hop *picking finger* and *finger bar construction.*" (Emphasis supplied.)

With respect to the first element, the "bar itself", the object is stated to be "to provide a finger bar and picking finger arrangement *obviating the use of clamps, ties, pins or other fastening means for the individual fingers,*" by having "all of the fingers (being) secured to the finger bar *by a single master pivot pin* of a readily detachable character" (R. 219, col. 2:29-35). (Emphasis suplied.)

At the time of the trial the appellant disavowed this feature or element of the claimed combination, declaring it was merely the second element or feature, namely, "the interlocking finger construction", that constituted the invention. Appellant stating to the trial court that "the invention resided merely in the idea of eliminating" the clip used in the prior art (R. 28:2-5); and, "it is this partial twist that Mr. Thys invented that he was given a patent on" (R. 211:31-(212)1). Also reiterated in its Opening Brief (Op. Br. 3:17-24).

The appellee contends, among other things, that by such stipulation to the trial court the claims are conceded to be invalid as admittedly claiming more than the patentee invented. And, therefore, that there was concededly no basis for the institution of this costly patent infringement action against the appellee nor is there any basis for the prosecution of this present appeal.

The appellee also contended that the claims were invalid as (1) it was old in the art to insert a rod through helical coils (cf. Trowbridge, R. 234, Fig. 4) in order to secure or couple one member (finger) to or mount the same upon another member (finger bar); (2) it was equally as old to provide helical coils upon a device or element for the purpose of using said coils to connect the first element to a second element by the use of a connecting rod inserted through the coils.

Further, that there was no justification for the instigation of this action as the coils on the legs of the appellee's picking fingers are not provided for the purpose of securing the fingers to any other element (R. 101:10-13), nor could these coils conceivably be "adapted for slideable reception of a *finger bar*" as claimed in the patent. (R. 223, col. 9:65).

With respect to the second element or feature of the claimed combination, "the interlocking finger construction," the object is stated in the specification to be "to provide picking fingers which are mutually supporting and which flex as a unit and at the same time are readily detachable from each other and from the finger bar." (R. 219, col. 2:25-29).

Or, as more simply stated by counsel for appellant, this second element, the "interlocking finger construction" merely teaches that "the coils of the prior art patents might be used to support adjacent fingers." (R. 211:3-4).

It was the appellee's contention that it did not constitute invention to reduce the coiled interlocking finger leg construction of the prior art (cf. among others, Trowbridge (R. 233: Fig. 5.)), to a mere half twist on *each* leg of a picking finger.

And, the appellee also contended, inter alia, that as the picking finger used by the appellee obviously did not have a "complementary bend" of the type specified and claimed in the patent, or in fact any other type of "complementary bend" on *each* of the legs of her picking finger, as called for in the claims of the patent, that there was no basis for the institution of the action for infringement against her.

The appellee further contended in support of her prayer for attorneys' fees:

(1) that as the appellee's finger construction was admittedly (R. 74) the construction called for in disallowed Claim 27 (R. 74:25-30) that there was no probable basis for the charge of infringement and that the action was instigated in bad faith;

(2) that the appellant admittedly recognized at the time appellant's president (the patentee) and its attorney inspected appellee's machine in September, 1951 (R. 52:

16-20), or nine months before the action was filed, that the finger of the appellee was secured from the same source (R. 51:18-(52)20) as that from which appellant secures its picking fingers, namely, appellant's alleged licensee (R. 49; 93; 94:23-32); and, therefore, there was no basis for the bringing of this action;

(3) that the appellant, contrary to the allegations in its pleadings (R. 4), was well aware it had not given sufficient notice, or, in fact, any notice at any time whatsoever to the public or to the appellee prior to filing this action that it claimed a patent monopoly on any combination finger assembly construction (R. 95; 108:13-17); and the appellant was well aware that the appellee was not using any picking finger that had not been purchased subsequent to the date of the license agreement with the said seller-licensee; consequently, this action was brought in bad faith;

(4) that the evidence conclusively establishes that the sole and only purpose for instigating the present cause of action as well as that litigation entitled "Horst Company v. Sophie Oeste," filed at the same time, namely, June 6, 1952, and in which the patent also was held invalid, being reported in 114 F. Supp. at page 408, was to harass, annoy, worry and oppress the appellee, Miss Oeste (since deceased in April, 1954, at the age of 67), and thus force her to settle the then pending action in the trial court entitled, "Horst Company and Thys Company v. Sophie Oeste, now pending in this Court on an appeal taken by plaintiffs, being Appeal No. 13,885, inasmuch as the alleged basis for the two additional threatened infringement actions was admittedly known to the appellant and its patent counsel in September, 1951, but that said threats of action were made for the first time nine months later and only at a time when appellee's patent counsel was known to appellant to be ill and unable

for an indefinite period to give advice with respect to such charges of infringement and threatened action (R. 128: 10-13; 105:2-5).

The trial court in finding the claims sued upon invalid for lack of invention, made no other findings with respect to the other defenses raised by the appellee. Such other grounds relied upon by the appellee, together with any other ground established by the evidence are, of course, available on appeal in support of the trial court's judgment holding the claims invalid.

Nor did the trial court make any finding with respect to appellee's prayer contained in her answer herein for an allowance of attorneys' fees; nor was any mention made in the Memorandum and Opinion as to why such request had not been allowed.

The appellant noticed an appeal from the judgment, and failing to designate for inclusion the complete record and all proceedings and evidence had in the action, the appellant filed pursuant to Rule 75(d) of the Federal Rules of Civil Procedure, a paper entitled "Appellant Thys Company's Statement of Points on Appeal" (R. 44; 213-214).

The four points set forth in said Statement being in the same chronological order and substance as those contained in the abortive Statement of points filed by this appellant in the pending appeal before this Court, No. 13,885.

A copy of this same Statement of points was later filed by appellant with this Court, allegedly to comply with this Court's Rule 17(6).

Subsequent to the appellant's designation of the record, the appellee filed her designation of additional contents of the record (R. 44). And, also, the appellee, pursuant to Rule 19(6) of this Court's rules filed a concise statement of the points on which she intends to rely (R. 215) on her cross-appeal.

While the appellant made no application to this Court to be permitted to do so, the appellant completely abandons its alleged four points on appeal previously filed and served, (R. 213-214) and upon which basis appellee made her designation of the record, and set forth in its opening brief (Op. Br. 20-23) 14 new and entirely different points under its specification of errors.

QUESTION INVOLVED

The appellant presents no question for this Court's consideration.

The appellant having failed to present and argue in its opening brief the points set forth in its statement of points on appeal, (R. 213-214) the same must be considered abandoned. And, pursuant to Rule 17(6) this Court "will consider nothing but * * * the points so stated."

Nor was any application made by appellant to this Court to be permitted to file a substitute or amended statement of points on appeal. Consequently the matters now taken up in appellant's opening brief are not properly before this Court.

The only question presented for review on this appeal is that presented on behalf of the appellee on her cross-appeal, namely, whether there was an abuse of discretion on the part of the trial court in failing to award the appellee reasonable attorneys' fees as provided for in Section 285 of Title 35, United States Code, and as prayed for in her answer.

SUMMARY OF ARGUMENT

1. Where the appellant fails to comply with the rules of this Court, there is nothing presented for this Court's consideration and the judgment of the trial court should be affirmed as to appellant's appeal.

2. The appellant's failure to comply with the Federal Rules of Civil Procedure as well as the rules of this Court with respect to appeal procedures cannot be considered as inadvertence or an oversight.

3. The appellee reiterates her points 1 and 2, Summary of Argument, page 5 of the Brief of Appellee, in the pending appeal entitled Thys Co. et al. v. Oeste, No. 13,885, namely:

> "1. It is a fundamental principle of American jurisprudence that not only shall the Court be specifically advised as to the matters that it is called upon to decide by the complaining party, but that the opposing party shall also be particularly advised in such matters in order that he may be placed in a position to make reply thereto should he desire to do so.
>
> 2. The rules of this Court contain definite and mandatory provisions whereby the Court and the opposing party shall be specifically and particularly advised in all matters presented for the Court's consideration."

4. The appellant's contemptuous disregard of the orderly rules of procedure on appeal is clearly shown by its abortive attempt to place before this Court in its brief 14 new and different points on appeal all without leave of this Court first having been timely had.

5. The appellant shows a further disregard for this Court's rules in the form and substance of the now alleged 14 new points on appeal.

6. There is admittedly no merit in this appeal, the appellant concedes the claims sued upon claim more than the patentee invented.

7. The appellant having failed to include in its printed record before this Court all of the evidence before the trial court, admitted by appellant to be material to the consideration of its appeal, this Court must conclusively presume

that such evidence is unfavorable to the appellant and that the same supports the judgment.

8. The judgment of the trial court finds abundant support even in the very emasculated form of the evidence presented by appellant to this Court.

9. The confused, ambiguous and unintelligible statements of the appellant, as well as its constantly changing and shifting of position on appeal attest to the frivolous nature of this appeal, and there is presented nothing for this Court's consideration.

10. The limited record on appeal establishes numerous grounds available in support of judgment of invalidity.

11. The presumption of validity which usually attaches to issuance of a patent, completely destroyed with reference to patent in suit.

12. It is impossible to find a reported case wherein the evidence of grossly oppressive tactics and general bad faith in the instigation and prosecution of litigation exceeds that employed and exhibited by the appellant in the instant case.

13. The evidence is clear that where the Court fails to award reasonable attorneys' fees under such onerous circumstances as present in the instant case, that the public becomes very reluctant to incur the burden of the heavy legal expense necessary to challenge the validity of the grant of a patently unwarranted patent monopoly or a patent being used for oppressive purposes.

14. Section 285 of Title 35 of the United States Code recognized that patent infringement actions involve heavy legal expenditures and that a patentee does not acquire along with his patent a grant to threaten, institute and or continue to prosecute maliciously frivolous and expensive patent litigation.

15. All of the facts in this case fully support the appellee's position that there is presented here the type of excep-

tional situation contemplated by the Statute, and that the trial court should have made an award to appellee of reasonable attorneys' fees, and to fail to do so constitutes abuse of discretion and error on the part of the trial court.

Argument

Adherence to Procedural Rules of This Court Mandatory

The appellee herein in her reply brief filed in Appeal No. 13,885, now pending before this Court between the same parties called attention to the necessity of compliance with this Court's rule and further directed attention to the added factor of gross unfairness and heavy burden that an appellee suffers when the orderly rules of appeal procedure are not complied with (Brief for Appellee, Appeal No. 13,885, pages 6-9).

Consequently, the appellee believes that the conduct of the appellant in filing its opening brief in the present appeal in as equally a flagrant disregard of this Court's rules, and, in addition, its disregard of the provisions of Rule 75(d) of the Federal Rules of Civil Procedure, must be considered as premeditated and deliberately in defiance of the decisions of this Court and the decisions of other Circuit Courts of Appeal as to the necessity of compliance with the procedural rules of the Court.

The following cases being relied upon by appellee in said pending appeal, No. 13,885, and are also relied upon herein:

Mutual Life Insurance Co. v. Wells Fargo, (9 Cir.) 86 F.2d 585, cert. den. 291 U.S. 676, 54 S.Ct. 527; reh. den. 292 U.S. 601, 54 S.Ct 627;

E. R. Squibb & Co. v. Mallinckrodt, Chemical Works, (8 Cir.) 69 F.2d 685, 687, cited with approval by this Court in *Mutual Life Insurance Co. v. Wells Fargo Bank,* supra;

Humphreys Gold Corp. v. Lewis, (9 Cir.) 90 F.2d 896, 897;

Twentieth-Century Fox v. Brookside etc., (8 Cir.), 194 F.2d 846, 852;

Comm. of Int. Rev. v. O'Donnell, (9 Cir.) 90 F.2d 907, 908.

And particular attention was directed to the recent case of *KoolVent Awning etc. v. Bottom,* (8 Cir.) 205 F.2d 209, wherein the Court stated at page 214:

> "* * * The points relied upon form the basis of the proceedings of this Court and their function is by analogy similar to that of the plaintiff's complaint."

The frivolous nature of the conduct of the appellant in its pretense of compliance with Rule 75(d) as well as Rule 17(6) is clearly shown by the fact that the alleged Statement of points on appeal filed by the appellant herein comprises the same four points set forth in the same identical order and substance as that Statement of points on appeal filed in the co-pending appeal No. 13,885—R. 249, 250, and Appellee is also firmly of the opinion that it is highly improbable that the appellant ever in good faith was of the opinion that this Court adopted its Rule 17(6) merely for the purpose of receiving a Statement of points on appeal so broad and general in character as to be applicable to any number of cases.

It is believed to be a fair inference that the appellant was unable to file a proper Statement of its points because this appeal is without merit.

Appellant Presents Nothing for This Court's Consideration

The appellant in its brief has not presented its previously filed points on appeal (R. 213-214) nor has it attempted to argue such points. Such points must, therefore, be considered abandoned.

The appellant has, rather, set forth 14 entirely new and different points in its brief (Op. Br. 20-23). These new points on appeal are not properly before this Court and need not be considered by it.

This Court has stated it will not consider any points other than those set forth and filed pursuant to its Rule 17(6).

Rule 17(6) states: "* * * the appellant * * * shall file with the Clerk a concise statement of the points on appeal on which he intends to rely * * * and the Court will consider nothing but * * * the points so stated."

In the case of *Western National Insurance Co. v. LeClare,* 163 F.2d 337 at 340, the Court held with respect to points not set forth in the required Statement:

"* * * These points were not stated in appellant's statement of points and hence need not be considered by us * * *."

And in the case of *Williams v. Dodds,* 163 F.2d 724 at page 725, this Court made a statement to the same effect and also cited with approval the case of *Western National Insurance Co. v. LeClare,* supra.

Nor has the appellant complied with the provisions of Rule 75(d) of the Federal Rules of Civil Procedure, 28 U.S.C.A., following 723(c). And, in that connection, the Supreme Court has stated that it does not constitute compliance with rules of this nature, where a too general and a too broad statement is filed. The Supreme Court holding as follows:

> "* * * The Circuit Court held that this question was not properly raised before it because respondent has failed in appeal to make 'a concise statement' of the point as required by Rule 75(d) of the Federal Rules of Civil Procedure, 28 U.S.C.A., following 723(c). Respondent argues that the question was properly raised, though not specifically by its *general point* that 'the doctrine of

res ipsa loquitur is not applicable to the facts of this case'. We cannot hold that the Circuit Court erred when it refused to consider the question because of respondent's failure to comply with Rule 75(d)." (Emphasis supplied)

Jesionowski v. Boston & M.R.R. (1947), 329 U.S. 452, 458-9; 67 S.Ct. 401, 407-8.

Further, this Court in the case of *Philip R. Park, Inc. v. Fed. Trade Comm.* (9 Cir.), 136 F.2d 428, at page 429 pointed out that the appellant had not argued the questions which they had set out in their Points on Appeal but had rather argued some points entirely different. The appellee in that case accepted the change of points and answered them in his brief. However, this Court pointed out that the mere acceptance of the points by the appellee does not necessarily mean that the Court will permit the substitution.

In the case of *Mutual Life Insurance Co. v. Wells Fargo Bank & Union Trust* (9 Cir.), 86 F.2d 585, (which case was cited by the appellee in her brief in the now pending appeal between these same parties No. 13,885) the Court directs attention to the necessity for requesting leave of this Court before the appellant is privileged to abandon his former statement of points on appeal with impunity, this Court stating as follows:

"* * * Rules of practice are necessary. If the parties, through oversight, fail in compliance therewith, they are afforded a remedy through amendment which is all sufficient to protect every substantial right. This Court has repeatedly permitted such amendments where *seasonably* sought and such accorded with the justice of the situation. This method not only amply protects the party but it preserves the helpful purpose of the appellate rules in providing orderly procedure. No request for such amendment was here made, and having failed to follow this easily available method, the

appellant is in no position to invoke the protection of Equity Rule 19." (Emphasis supplied)

Further, the additional legal expense to appellee of having appellee's counsel constantly checking and re-checking the record in the light of appellant's changing positions, especially where all of the record of the trial court is not included on appeal, can cause a real and unwarranted hardship to the appellee, which amounts to oppression.

It is submitted that the failure of the appellant to comply with this Court's rules as well as with the Federal Rules of Civil Procedure must be considered intentional and that because of such violation of the rules there is now presented nothing on behalf of this appellant for this Court's consideration.

Mutual Life Insurance Co. v. Wells Fargo etc., (9 Cir.), 86 F.2d 585 (citing many cases);

Jesionowski v. Boston & M. R. R., supra;

Bank of Eureka v. Partington, (9 Cir.) 91 F.2d 587, 589;

Rokey v. Day & Zimmermann, Inc., (8 Cir.) 157 F.2d 735; cert. den. 67 S.Ct. 1080, reh. den. 67 S.Ct. 1198;

Humphreys Gold Corp. v. Lewis, (9 Cir.) 90 F.2d 896, 897 (citing numerous cases);

Comm. of Int. Rev. v. O'Donnell, (9 Cir.), 90 F.2d 907, 908;

State of Washington v. U. S., 9 Cir., 1954, 214 F.2d 33, 45.

Further, this Court's attention is directed to the fact that even the now stated 14 new points (Op. Br. 20-23) include in most instances two to three specifications of error under each point. Also, the specification of error No. 1 (Op. Br. 20) is additionally objectionable by reason of failing to comply with this Court's Rule 18, 2(d) which provides:

> "When the error alleged is to the admission or rejection of evidence the *specification shall quote* the grounds urged at the trial for the objection *and* the *full substance* of the evidence admitted or rejected, and refer to the page numbers in the printed * * * transcript where the same may be found." (Emphasis supplied.)

This Court stated in the case of *Dayton etc., v. Sabra,* 63 F.2d 865, 866, "assignments of error in admitting or rejecting evidence must quote full substance of evidence—evidence not assigned according to this rule will be disregarded".

The appellant herein in the referred to co-pending appeal No. 13,885 was also derelict in complying with this above rule of Court. See appellee's brief in said appeal No. 13,885, pages 56-59.

Appellant Concedes Present Appeal Frivolous In Nature

The appellant states to this Court that this appeal is taken for the two-fold purpose of having this Court re-write the claims of the patent sued upon so that the same will merely claim "the use of a twist instead of a clip to join steel wire hop-picking fingers", and to then find such re-written claims valid (Op. Br. 3:17-24).

The appellant thus reiterating to this Court its insistent assertions to the trial court that as a matter of fact the only thing the patentee really is alleged to have invented is this alleged twist. (This brief, page 5; R. 228:2-5; 211:31-(212)1).

Such stipulation as to a material fact constitutes evidence and the Court is entitled to rely upon such stipulated fact.

> *American Chemical Paint Co. v. Dow Chemical,* 6 Cir., 164 F.2d 208;
>
> *Barkeij v. Lockheed Aircraft Corp.,* 9 Cir., 1954, 210 F.2d 1, 2.

The patent claims in suit are, therefore, conceded to be invalid because of claiming more than the patentee invented. Consequently, there is obviously no basis for this appeal on the part of appellant.

Material Evidence Not Placed of Record Must Be Presumed to Support Judgment Appealed From

The appellant concedes that it has not placed before this Court all of the evidence material to its appeal that was considered by the trial court.

The records and files of this Court disclose that the appellant filed on or about August 18, 1953, a partial Designation of the Contents of Record on Appeal which appellant deemed material to consideration of its appeal (said designation comprising 12 items) and completed said designation on or about November 21, 1953. The exhibits deemed material were placed under one item of this designation.

On December 21, 1953, the appellant moved this Court for its Order dispensing with the necessity of printing 21 exhibits designated as material by appellant. The appellant naturally did not make any claim of financial hardship as the basis for such a request.

The appellee opposed the motion on the grounds that the exhibits were too numerous, as well as some being quite small. Further, the appellee pointed out that the appellee's counsel had been compelled to expend considerable time and effort in assisting the Clerk's office in locating some of the original exhibits which apparently had been misplaced by the District Clerk's office, and that due to the size and number and the importance of the exhibits to the appellee, appellee was loathe to have so many exhibits handled by so many persons, especially when some exhibits could not be replaced.

This Court in denying the appellant's motion, suggested that the appellee and appellant endeavor to stipulate with respect to some exhibits that might be used in their original form.

On the same day as the hearing of appellant's motion, namely, December 21, 1953, counsel for appellee addressed a letter to the appellant's counsel looking toward carrying out the suggestion of this Court. A copy of this letter was furnished to the Clerk of this Court. Also, an additional photostatic copy was attached to the papers of appellant's counsel filed with this Court in opposition to appellee's motion to dismiss (presented to this Court on January 11, 1954), on the grounds of appellant's failure to go forward with the printing of the record. The appellee's counsel did not receive the courtesy of a reply from the appellant's counsel to this offer of stipulation and appellant thereafter secured the order of this Court with respect to the acceptance by this Court of printed Patent Office copies of the patents and permitting the appellant to submit only eleven (11) copies of the Book of Exhibits.

Thereafter, the appellant caused to be printed a record from which was omitted that evidence admitted to be material to this appeal by the appellant in its motion above referred to, which was denied by this Court, and which evidence this Court required to be printed if it was to be considered.

That such omitted evidence must be conclusively presumed as unfavorable to the appellant and as supporting the judgment of the trial court is well established. This Court stating in such cases as *Greco v. Haff*, 63 F.2d 863, at page 864 that the presumption is that exhibits not made a part of the record by appellant are unfavorable to him.

And, that where on appeal the evidence is not brought up,

the Court rules presume it supports the verdict, findings, judgment or decree.

Heffron v. Western Loan & Building Co., (9 Cir.), 84 F.2d 301, cert. den. 57 S.Ct. 189, 299 U.S. 597, 81 L. Ed. 440.

This Court also pointing out in the case of *Heffron v. Western Loan & Building Co.,* supra, that where the record before the Court of Appeals fails to show such record is a complete and entire record of the trial court's proceedings "There is nothing in it which gives any indication that *all* the proceedings before the referee or the Court have been included therein," it must be presumed that the evidence not brought up supports the judgment. The Court holding, as against the claim by appellant of lack of evidence not appearing from the record, that the Court of Appeals would presume that the district court correctly decided all issues before it which might depend on factual evidence.

Or, as particularly stated in the case of *Greco v. Haff,* supra, "Nor can we disturb the findings * * *, because at the hearing certain exhibits, consisting of printed pamphlets, were introduced in evidence but have not been incorporated in the record on appeal * * *. We are therefore precluded from reviewing this finding (*Evanoff v. Bonham* (C.C.A. 9), 50 F.2d 756); and the presumption is that the exhibits are not helpful to appellant's cause. (*Jurgams v. Seaman,* (C.C.A. 8), 25 F.2d 35, 36)."

And, in such cases as *U.S. v. Foster,* (9 Cir.) 1941, 123 F.2d 32, this Court has stated that a presumption of correctness attaches to the findings made by the district courts, and an appellant seeking to overthrow those findings has the burden of presenting a proper record to the Circuit Court of Appeals.

As the burden of establishing error in the district court's findings rests upon the appellant, it would seem axiomatic that unless all the evidence material to the question before the trial court is before the appeal court, it cannot be said that the findings are not supported by the evidence.

McColgan v. Maier Brewing Co., 134 F.2d 385, cert. den. 64 S.Ct. 37, 320 U.S. 737, 98 L. Ed. 437;

Dant & Russell v. J. D. Halsted Lumber Co., (9 Cir., 1939) 103 F.2d 306;

Wingate v. Bercut, (9 Cir., 1945) 46 F.2d 725.

Or, as held in the case of *Bank of Eureka v. Partington*, 9 Cir., 91 F.2d 587, 590, "A decision on the question thus attempted to be raised would require an examination of the evidence. The evidence is not in the record. * * * Not having the evidence before us, we indulged the presumption that it (evidence) justifies the Order which the District Court made."

The above cases are in conformity with the provision promulgated by this Court in Rule 17(6) wherein this Court states that it will consider only "those parts of the record" that have been printed. And further stating in said rule that "If at the hearing it shall appear that any material part of the record has not been printed, the appeal may be dismissed, * * *".

It is submitted that the records and files of this Court establish that the appellant herein knowingly caused material parts of the record not to be printed, and this appeal may, therefore, be properly dismissed insofar as the appeal of the appellant is concerned.

It might be well before leaving this point to direct attention to the fact that the appellant herein, also the appellant in the co-pending appeal before this Court No. 13,885, is

fully aware of the need for this requirement in the Court's rules, because at page 63 of the Opening Brief in said Appeal No. 13,885, this appellant particularly directs this Court's attention to this necessity. The appellant quotes a portion of a decision wherein the court stresses that it is only because "Each of these documents was before the trial court and is before us. * * *", that enables the appeal court to consider the matter.

And, it should be noted that the trial court in the instant case was greatly influenced by the evidence contained in the file wrapper of this patent. The trial court stating in its Opinion (R. 21) with respect to the patent in suit that *"By numerous amendments tenaciously pressed upon the Patent Office, the plaintiff's assigner finally succeeded, after four years of debate, in obtaining patent No. 2,448,063 hereinafter referred to as the patent in suit, * * * After a study of the voluminous file wrapper, the Court is of the opinion that the patent was obtained—in part, at least—by progressively narrowing the claims so that they now resemble the achievement of the German specialist who kept on learning more and more about less and less, until at last he had learned everything about nothing at all!"*

This file wrapper was one of the exhibits which the appellant omitted to have printed in the present record after this Court had denied the appellant the privilege of using only the original exhibit. Nor, did the appellant make any attempt to designate any portion of the file wrapper to be printed.

Appellant's Presently Stated Points Unintelligible And Not Argued.

The variance between the now stated 14 points on appeal set forth in appellant's brief (Op. Br. 20-23) and its argument following this statement of points is further evidence,

if such were required, that this appeal of the appellant is completely unjustified and without merit.

The confused statement of appellant's position coupled with the ambiguousness and unintelligibility of its remarks throughout its brief, are of such magnitude as to give the impression of being a studied effort on the part of appellant to cover up, if possible, the lack of a ground for this appeal, rather than being made for the purpose of advising this Court of any real prejudice suffered by the appellant.

And, not the least of the factors contributing to this confusion is that of the repeated contradictions found between the various statements and arguments of appellant.

Turning first to the variance between the points as now stated by appellant to be its position on appeal, and the argument of appellant presumably in support of such points.

While appellant's brief is replete with variances of this nature, appellee will not burden this Court with their complete enumeration, believing the following will suffice for purposes of illustration.

1. The appellant (Op. Br. 24) set forth a sub-heading under Argument which relates to the province and jurisdiction of this Court under the provisions of Rule 52(a) of the Federal Rules of Civil Procedure. However, under this heading, other than making one small reference to the fact that this rule does not preclude this Court under certain circumstances from reviewing documentary evidence, the appellant argues matters pertaining to the use of expert witnesses at the time of trial. The appellant stating (Op. Br. 25), "And in this case, we find that the expert was guilty of misinterpreting the most pertinent prior art disclosure."

The argument, therefore, under this point, as nearly as appellee can understand it, appears to be directed to the point of whether or not it lies within the sound discretion of

the trial court to determine when a given case or situation calls for expert opinion. There is no assignment of error remotely resembling one pertaining to the abuse of discretion of the Court in this connection. The confused statements of appellant throughout this discussion make it absolutely unintelligible to the appellee.

2. The need for strict compliance with this Court's rule with respect to the assignment of error as to the admission or rejection of evidence namely, Rule 18, 2(d), wherein it is specified that—

> "When the error alleged is to the admission or rejection of evidence the *specification shall quote* the *grounds urged* at the trial for the objection and the *full substance of the evidence* admitted or rejected, *and refer* to the page numbers in the printed * * * transcript where the same may be found," (emphasis supplied)

is succinctly pointed up in the appellant's present abortive specification of error No. 1 (Op. Br. 20).

In the first place, no assignment of error remotely resembling this point was made by appellant in its Statements of Points on Appeal. Secondly, the record clearly establishes that the appellant's counsel withdrew appellant's objection to the testimony of the expert, Mr. Trabucco (R. 137), stating that "there is no harm except it takes" up time. And, stating again to the trial court, "We have no objection in the slightest to this witness testifying how such and such a thing on such a patent works * * *." (R. 138:16-18). As a result, the abortive specification of error 1 of appellant (Op. Br. 20) and its argument are so wholly at variance as to render this entire specification of error completely incomprehensible and unintelligible.

State of Washington v. U. S., 9 Cir., 1954, 214 F.2d 33, 45.

It might be well at this point, however, to direct this Court's attention to the totally unwarranted, unfounded and uncalled for remarks and insinuations of appellant with respect to the witness Mr. Trabucco.

Mr. Trabucco is a man of the highest standing in his profession. He has been a patent attorney for 30 years (R. 133); has enjoyed the distinction of being appointed by the court as a master, rendering opinions concerning the validity and infringement of patents (R. 133). To insinuate as the appellant has (Op. Br. 17) that Mr. Trabucco would have his opinion influenced merely because he received a fee for his work is grossly unjust, unfounded and unwarranted. The remarks of appellant with respect thereto are all the more unjustified when it is considered witnesses who receive only the statutory fee are those witnesses that are compelled by law to testify.

If any witness had an ulterior motive in giving his testimony it was admittedly the appellant's president, Mr. Thys, the patentee. And, in fact, little credit can be placed in the testimony of this witness. Mr. Thys' testimony is replete with contradictions.

The remarks with reference to the expert witness Mr. Trabucco are as groundless as was the bringing of the present action against the appellee, and as baseless as this appeal on the part of the appellant.

3. Nor is there to be found any consistency between specification of error 2 (Op. Br. 21), with reference to the trial court's finding 4, and the argument addressed to such finding 4 (Op. Br. 28). The statement of point appears to contain two assignments of error, one assignment apparently directed to whether the yardstick or principle applied as a basis for the finding was correct and the other as to whether there is any evidence in the limited record placed before this court for making the finding.

However, the argument, as near as appellee's counsel is able to determine, seems to be addressed solely to whether the term "scheme of advancing scientific knowledge," used by the trial court, comes within the Constitutional language "to promote the Progress of Science and Useful Arts." This, of course, is not an argument that the finding of invalidity is unjustified on the record that was before the trial court.

Then appellant goes off on the point of "utility" and appears to be urging that a device need only be found to have "utility" to be considered an invention (Op. Br. 28-29). That if a device is the result of merely mechanical skill it cannot have "utility"; that the results of mechanical skill and "utility" are adverse terms. In any event, the argument is so at variance with the abortive specification of error 2, as to make the whole completely confused and ambiguous to the appellee.

4. And so it is throughout the abortive 14 points as stated by appellant—all equally unintelligible, incomprehensible and at variance with the ambiguous statements set forth in its brief under the caption "Specification of Errors" (Op. Br. 20-23), as near as the appellee is able to determine.

However, before leaving this subject, it might be well to note one more of the most flagrant variances. This is found in specification of eror 5 (Op. Br. 21), addressed to the trial court's finding 7, wherein it would seem that appellant is urging that the prior patents referred to in finding 7 do not disclose a picking finger having a V-shaped picking portion; do not disclose a picking finger having parallel legs; or a picking finger having means to anchor the finger to a finger bar; nor had the referred to prior patents disclosed picking fingers arranged in row formation on a picking finger bar, or the further disclosure of having the legs of adjacent picking fingers coupled together. The finding

clearly states that the trial court found such features to be disclosed in the referred to prior art patents and that as a consequence such features must be considered old in the art.

Apparently, it is the appellant's position that the trial court should not have made any finding with respect to what the Court considered to be disclosed in the prior art. Appellant's argument under this specification renders the language of the specification even more ambiguous and unintelligible by urging that the finding was either a broad or a narrow construction of the claims in suit, and that a finding with respect to the prior art was erroneous and that the trial court erred in making any finding with respect to the prior art.

And, as the appellant on this appeal concedes, "All of the mechanical devices required to make up the Thys combination were old in this case, as they were in the companion case, Appeal No. 13,885" (Op. Br. 9:14-16), it becomes even more incomprehensible as to just what the appellant is urging with respect to this particular abortive specification of error.

Perhaps it would be just as well, at this point, to note that the statements in appellant's brief (Op. Br. 44-45) with respect to Conclusion of Law 2 are unwarranted and unfounded. For, while the Court did find in accordance with the provisions of Section 103, Title 35, United States Code, with respect to the subject matter set forth in the claims as a whole, it was not necessary for the trial court to have done so in view of appellant's stipulation to the trial court that the invention resided "merely in the idea of eliminating the clips on the tops of the fingers."

In the case of *John B. Stetson Co. v. Stephen L. Stetson Co.,* C.C.A. N.Y., 133 F.2d 129, the court pointed out that

a party cannot successfully claim an error which he, himself, is responsible for or rulings which he has invited the trial court to make.

Or, as in the case of *American Chemical Paint Co. v. Dow Chemical* (6 Cir., 1947), 164 F.2d 208, the Court pointed out in permitting the certification of a portion of the record containing a transcript of the argument of counsel, that where counsel in his argument relating to facts or procedure makes a stipulation, such stipulation is binding on the litigant whom he represents. (Cf: *Barkeij v. Lockheed Aircraft Corp.,* 9 Cir., 1954, 210 F.2d 1, 2).

It is submitted, therefore, that the appellant has neither properly placed before this Court its now stated 14 points on appeal, nor has the appellant argued such points, but has argued completely different points, not set forth in either its original statement of points on appeal or in its now abortive 14 points on appeal. Consequently, there is presented nothing for this Court to review on behalf of the appellant.

Appellant's Efforts to Suppress Evidence Supporting Judgment of Invalidity Unavailing.

That the four claims of the patent at issue herein are clearly invalid in view of the prior art is evidenced from but a cursory review of the very limited record that the appellant has seen fit to present to this Court, as well as the testimony of the expert Trabucco (R. 133-200) with respect to these disclosures.

The abundance of this evidence now about to be referred to by appellant, also adds to the incomprehensibility as to wherein the appellant could possibly find any error in the judgment of the court in holding the four claims of the patent invalid.

Taking the elements of the claims at issue in the order in which they are listed by the appellant in its Chart set forth in its Opening Brief (Op. Br. Appendix A):

1. "V-shaped picking portion."

That this element is old and was well known long prior to the claimed invention at issue is clearly established by but a slight glance at the following references, which the patentee Thys must have been well acquainted with: HORST, Patent No. 1,008,914 (R. 285: Fig. 11); HORST, Patent No. 1,012,135 (R. 293: Fig. 2); HORST, Patent No. 1,054,122 (R. 297: Fig. 3); HORST, Patent No. 1,054,119 (R. 302: Fig. 12); HORST, Patent No. 1,054,551 (R. 314: Fig. 13); MILLER, Patent No. 2,139,029 (R. 353: Fig. 6).

And a V-shaped picking portion for a hop picking finger is also disclosed in prior art patent issued to TROWBRIDGE, Patent No. 968,001 (R. 233: Fig. 4, Fig. 5) and it is also found in the British patent to GRAY, Patent No. 512,540 (R. 260: col. 1; col. 2: claim 4).

The designation of the element as a V-shaped picking portion states its function succinctly and establishes that such element performs the same function in the prior art patents just referred as it performs in the present combination.

2. The feature described in the present claims as having the side arms of the picking portion extended to form legs or arms is found even in the early patent to Moore, Patent No. 562,504, issued July 7, 1896 (R. 363: Fig. VIII) showing such extension of a U-shaped picking portion.

V-shaped picking portions so extended as presently claimed by the Thys' patent in suit are to be found in the following references: THYS, Patent No. 2,191,183 (R. 254: Fig. 4); GRAY, Br. Pat. No. 512,540 (R. 258: Fig. 4); HORST, Patent No. 1,008,914 (R. 283: Fig. 6); HORST,

Patent No. 1,012,135 (R. 293: Fig. 2); HORST, Patent No. 1,054,122 (R. 297: Fig. 3); HORST, Patent No. 1,054,119 (R. 302: Fig. 12); HORST, Patent No. 1,054,551 (R. 314: Fig. 13); MILLER, Patent No. 2,139,029 (R. 353: Fig. 6).

The following prior patents also disclosed the feature of extending the picking portion of a picking finger into parallel legs or arms: TRAPHAGEN, Patent No. 1,358,481 (R. 368: Fig. 1); LIVERMON, Patent No. 1,776,736 (R. 347: Fig. 2); HARRINGTON, Patent No. 1,350,452 (R. 276: Fig. 4); HARRINGTON, Patent No. 1,035,437 (R. 269: Fig. 2).

These references to the prior art, taken with the sound testimony of the expert Trabucco as to their disclosures and functions, makes it obvious that these parallel leg portions perform the same function in these prior art references as the parallel leg portions perform in the claims of the patent before this Court.

3. Likewise, the feature of providing means on the leg portion of a picking finger to anchor the said finger to a finger bar is disclosed in numerous references of record. And even to the extent of having the bar removable to detach a damaged or broken finger.

In the patent to TRAPHAGEN, No. 1,358,481 (1920) (R. 369), the very same thing which Thys claimed in his specification of the patent in suit as an improvement, namely, "the fingers being secured to the finger bar by a single master pivot pin of readily detachable character," was stated in 1920 in the patent issued to TRAPHAGEN (R. 369) as being old. The statement being in the following language in this TRAPHAGEN patent (R. 369:19-35):

> "* * * it is now common practice to mount the rake teeth (fingers) on these bars (finger bars) with the

spring coils of the teeth encircling their respective rake bars. This construction necessitates passing a rake tooth lengthwise over a rake bar, or rather, stringing the teeth on a bar. It follows, therefore, that in case any rake tooth (finger) is injured or broken during use, as frequently occurs when the rake is drawn over uneven obstructions or for other reasons, it becomes necessary to remove one or more rake teeth. This can be done only by removing all of the rake teeth from one end or the other of the rake bar at the side of the injured tooth to remove the latter. * * * (parenthetical inserts supplied)

In other words, to provide the type of means called for in the patent in suit (R. 219, Col. 2:33-35; 220, Col. 4:35-45) whereby you would be required to withdraw a rod or pivot pin from all of the fingers up to, say, the middle finger on the rod or pin, in order to repair or replace the middle finger, is to provide the same device which was old in 1920, and considered inefficient at that time.

The patent to Traphagen, supra, was not cited by the Patent Office against the claims in suit. Consequently, the presumption of their validity is destroyed.

As in the co-pending appeal No. 13,885, we have the appellant herein claiming invention by means of retrogressing.

However, it is significant to note here that the appellant admits that it was well aware that the appellee uses the means disclosed in the early patent to MOORE and WELLER (1896) (Op. Br. 9:25-(10)5) and not that of the patent in suit, to anchor appellee's fingers to a finger bar.

In the patent to LIVERMON, No. 1,749,040 (R. 342, Fig. 2) the bar element 25 is shown to be inserted through the spring element 13 of the picking finger in order to anchor the finger. This figure of the drawings referred to clearly

illustrates the use of a coil spring on the leg of the picking finger for the purpose of anchorage.

This patent to Livermon was not cited against the patent at issue herein by the Patent Office (R. 224).

And, of course, the British patent to GRAY, No. 512,540, teaches such a construction (R. 258:Fig. 4).

Then, too, the patent issued to THYS, 2,191,183 (R. 254) discloses such an element, especially in Figs. 2, 3, 4, and 5.

The patent issued to MORRIS, No. 1,704,805 likewise has a similar disclosure (R. 246: Fig. 11). The Patent Office also failed to cite this reference of the prior art (R. 342).

And, means for anchoring of a similar element to a rod or bar is also disclosed in the patent to TROWBRIDGE, Patent No. 968,001 in Fig. 4, being element 5 anchoring element or part "g" (R. 234: Fig. 4).

Such anchoring means is also disclosed in the patent to FERGUSON, Patent No. 912,835 (R. 228: Fig. 5).

Now, if this element, "the specific rod and finger arrangement of the Thys' patent" (Op. Br. 9:25) is given the scope insisted upon by the appellant (R. 100; 19-34) i.e., any coil that may conceivably be adapted to receive a pivot pin constitutes the specific element or rod disclosed by Thys, then the following references must be considered as disclosing such an element: HARRINGTON, Patent No. 1,035,437 (R. 269: Fig. 2); HARRINGTON, Patent No. 1,350,452 (R. 276: Fig. 4); LIVERMON, Patent No. 1,158,248 (R. 327: Fig. 7); LIVERMON, Patent No. 1,744,806 (R. 335: Fig. 9); LIVERMON, Patent No. 1,776,736 (R. 347: Fig. 1); MOORE and WELLER, Patent No. 563,504 (R. 363: Figs. VII-VIII); TRAPHAGEN, Patent No. 1,358,481 (R. 368: Figs. 1, 2, 3).

From the above it is obvious why the appellant conceded in the trial court and on this appeal that the above referred

to elements performed no different or added function in the present "Thys' combination" (Op. Br. 9:15) than said elements or parts performed in the prior art and was therefore most desirous that the invention be considered as residing only in the elimination of the clip disclosed in the Horst prior patent.

4. Turning now to that element of the combination claim calling for complementary bends to couple similar adjacent legs of a picking finger by hooking them together.

There can be no dispute but that the prior patent to TROWBRIDGE, Patent No. 968,001 (R. 233: Fig. 5) discloses the coupling of two legs of a finger by twisting them together.

Now, it must be kept in mind that the element so far stated merely calls for bends whereby "each leg may be coupled to similar adjacent legs" and, certainly, two legs of one picking finger are adjacent to each other. So it is clear that Trowbridge teaches the joining of two adjacent picking finger legs together by twisting.

The appellant particularly conceding this by stating "We find the Trowbridge patent in 1910 which had two legs of a picking finger twisted together * * * and then we find in the old barbed wire patent in the 1880s, which involved a spur on a piece of wire, because the barb was held in place by twisting two wires together" (R. 210:12-19) and, further, stipulating that "so twists were well known" (R. 210:20).

Now in the particular claims before this Court the patentee then goes on to recite that these complementary bends just referred to are to "include(ing) a partial encirclement of a finger by an adjacent finger". The significant word in this qualification found in the claim is the word "including". The claim is indefinite as not specifying what

else it includes besides the partial encirclement of an adjacent finger. It would appear from the reading of the claim that the two legs of a single picking finger might well be twisted together and then encircled by another finger.

Then if it be assumed, without conceding the same, that the claims mean to state that one leg of one picking finger is twisted around a similar leg of an adjacent finger, the twisting of such similar legs of two or more picking fingers together, is the same as taught by Trowbridge with respect to the legs of a single finger.

In other words, does it amount to invention over the prior art disclosure of twisting similar legs of one picking finger together to twist similar legs of adjoining fingers together?

The Patent Office Examiner considered the disclosure in Fig. 5 of the Trowbridge patent (R. 233) as teaching the method of connecting adjacent legs of picking fingers with each other by interlocking and twisting of the legs (R. 190:15-23).

And, it might be well to observe at this point that it has long been established that where an applicant for a patent discloses in his application a device that must inherently do a certain thing, he necessarily discloses that function, or that thing, even though he says nothing concerning it. Consequently Trowbridge teaches the appellant's construction.

Brand v. Thomas, 96 F.2d 301.

Or, as stated in the case of *In re Reynolds,* 109 F.2d 654, 656, the fact that the patent does not contain a claim covering diglycerids is not important insofar as the use of the invention is concerned. *The test is disclosure.*

cf: *Celite Co. v. Decalite,* (9 Cir.) 96 F.2d 242-248;

DeForest v. Gen. Elec. Co., 283 U.S. 664, 682, 686, 51 S.Ct. 563.

The patentee Thys, and president of the appellant, conceded (R. 103:9-17) that he was well acquainted with the old type of Horst picking finger (Def. Exh. C) and had seen the adjacent legs of such picking fingers connected to each other by means of homemade twists or the twisting of the legs together in the manner shown in Trowbridge, Fig. 5 (R. 233), and the fingers aligned along a finger bar in such a manner (R. 103).

The appellant is careful not to direct this Court's attention to this knowledge on the part of Thys. Rather, the appellant keeps insisting and reiterating over and over again that nothing new had been done in this field for 30 years. However, we see here, that men who make no claim to being mechanics, but are merely the growers of hops, adapting this well known principle (of securing two elements together by twisting them) without any difficulty or claiming it amounted to invention.

All the appellant claims for the patent in suit is that Thys reduced this homemade twist to a half-twist. And then the appellant concedes that such a reduction is old (Op. Br. 9:14). Each element is conceded to be old, including this half-twist (R. 211:3).

The next question is whether any of the mechanical devices or elements found in the present combination claims perform any new or different function out of the combination than they do in the combination. There is no evidence of record of any new function or result. The trial court, therefore, correctly found that the "mechanical devices required to make up the Thys' combination" perform no new and different function than they had performed in the prior art and that such combination was merely the summation of its parts, and that it would have been obvious to any one having the prior art before him at the time of the invention and, upon the principles enunciated by the

Supreme Court in the cases referred to, held the claims invalid for lack of invention.

In the recent case (1953) of *Shell Development Co. v. Pure Oil Co.,* 111 F. Supp. 197, the court in a similar fact situation as found herein stated as follows:

> "A logical step forward to be considered by anyone experimenting in the field, which accomplished no new or unexpected result, although of economic importance, is not a patentable improvement. (*Universal Oil Products Co. v. Globe Oil & Refining Co.,* 312 U.S. 417, 64 S.Ct. 1110, 88 L. Ed. 1399; *Vanadium Corp. of America v. Marzall,* 91 U.S. App. D.C. ....., 197 F.2d 187; *Minnesota Mining and Mfg. Co. v. Coe,* 99 F.2d 986). For anticipation is not necessary to show that the inventor had actual knowledge of the prior art. (Citing *Millett v. Allen,* 27 App. D.C. 70). * * *".

Or, as held in the case of *American Cyanamid Co. v. Marzall,* (1952) D.C. Cir., 196 F.2d 24 at page 25: "* * * the public cannot be deprived of an old process because someone has discovered that it is capable of producing a better result, or has a wider range of use than was before known. See also *General Electric Co. v. Jewell Co.,* 1945, 326 U.S. 242, at p. 248, 66 S.Ct. 8, 90 L. Ed. 43." This case also cites for its authority the case of *Lovell Manufacturing Co. v. Cary,* (1893) 147 U.S. 623, at page 624, 13 S.Ct. 472, 476 38 L. Ed. 30.

The Supreme Court in the case of *Smith v. Hall,* 57 S.Ct. 711; 81 L. Ed. 1049 points out that it is immaterial that the structure employed in the early use was neither the best that could be obtained nor as skillfully designed or used as that later employed by the patentee; these factors are not material on the question of validity of a patent for want of invention.

This Court in the case of *Parker Appliance Co. v. Irwin W. Masters, Inc.,* 9 Cir., 193 F.2d 180, held that if an improvement is to obtain the privileged position of a patent, more ingenuity must be involved than the mere work of a mechanic skilled in the art. To have reduced the homemade twist to a mere half twist is conceded to be old (Op. Br. 9) and would not even involve the skill of a mechanic in the art. It is admitted that a twist is nothing but an extended coil (R. 211:3).

And it has been repeatedly held in such cases as *In re Smith,* 262 F. 717, a claim cannot be allowed for a construction disclosed in a prior patent which would inherently accomplish applicant's purpose whether it was the intention of the prior patentee to make such a disclosure or not. Consequently, it is totally unimportant whether or not Trowbridge (R. 232) intended to use the twisting of the adjacent legs of the individual picking finger (R. 233: Fig. 5) for the same purpose that the homemade twists (R. 103:9-17) were utilized by the growers in connection with the old Horst type of picking finger (Def. Exh. C) (with which the patentee Thys was familiar) in order for the disclosure of Trowbridge to be considered as prior art.

Also, as stated in such cases as *In re Fink,* 62 F.2d 103, it is not necessary that a prior patent disclose how to make the disclosed article or device in order to have the disclosure considered as a good reference against the monopoly sought for its use by an alleged later inventor.

And in the case of *Cutter Laboratories v. Lyophile-Cryochem,* 9 Cir., 179 F.2d 80, this Court stated that where a process has been fully disclosed in the prior art without full appreciation of all its valuable attributes the perception of new advantages in the old process does not constitute invention.

In the case of *Autographic Register Co. v. Uraco, Inc.,* 182 F.2d 353, 355, the Court held it is not necessary that the inventor of a prior invention have the use to which his invention is put by the subsequent patentee in mind in order to have the prior invention considered as prior art.

And, as the trial court stated with respect to this patent in suit the language of the Supreme Court in *Great Atlantic & Pacific Tea Company v. Supermarket Equipment Company,* 340 U.S. 147, 71 S.Ct. 127, 95 L. ed. 162, is equally applicable here:

> "* * * A patent for a combination which only unites old elements with no change in their respective functions, such as is presented here, obviously withdraws what already is known into the field of its monopoly and diminishes the resources available to skillful men. The patentee has added nothing to the total stock of knowledge, but has merely brought together segments of prior art and claims them, in congregation as a monopoly."

The Supreme Court in this *Great Atlantic & Pacific case,* supra, endeavored to make it quite clear that the court was only reiterating what the Supreme Court felt it had made abundantly clear in its previous decision of *Lincoln Engineering etc. Co. v. Stewart-Warner,* 303 U.S. 343, 58 S.Ct. 662, 82 L. ed. 1008, wherein it was stated:

> "The mere aggregation of a number of old parts or elements which, in the aggregation, perform or produce no new or different function that that heretofore performed or produced by them, is not patentable invention. (citing numerous cases)."

With respect to this legal principle the appellee also relies upon all the other cases cited in the co-pending appeal between these same parties, No. 13,885, such as *Photo Chart v. Photo Patrol,* 9 Cir., 189 F.2d 625, and the more recent cases of *Kwikset v. Hilgren,* (9 Cir., 1954) 210 F.2d 483, 486,

Stearns v. Tinker & Rasor, S.D. Cal. 1952, 108 F. Supp. 237, and *Skoog et al. v. McCray Ref. Co.,* (7 Cir.) 211 F.2d 254, 257.

In this recent case of *Stearns v. Tinker & Rasor,* supra, it was again pointed out that every grant of a patent is a grant of a privilege of exacting tolls from the public, and an invention to justify such a privilege must make a distinctive contribution to scientific knowledge.

Presumption of Validity of Patent Herein Completely Destroyed.

As to the weight to be given to the presumption of validity, even where it has not been destroyed as in the present case, the very recent case of *Robertson v. Digaetano,* 5 Cir., May, 1954, 212 F.2d 1, (which cites the case of *Pacific Marine Supply Co. v. A. S. Boyle Co.,* 9 Cir., 103 F.2d 288,) the court therein stated at page 3, as follows:

> "We think there remains for consideration only appellant's suggestion that the Patent Office having sustained the device over the Houseman patent, the district court was not entitled 'to override the legal presumption and judgment of the Patent Office in favor of the Robertson patent over a cited reference.' While the presumption of validity which normally attends the issuance of a patent by the Patent Office is somewhat strengthened by its consideration and rejection of the patent relied upon to establish anticipation * * * it is nevertheless our province to determine when, as here, that presumption has been overcome. The *concurring opinion* of Mr. Justice Douglas and Mr. Justice Black in the *Great A & P Tea Company* case, supra, 340 U.S. 147, 71 S.Ct. 132, states that the ultimate 'question of validity of a patent is a question of law' for the Courts and that admonition should make us mindful of our duty to restrict upon judicial review 'the pressure to extend monopoly to the simplest of devices.' 340 U.S. at pages 155, 156, 71 S.Ct. at 132." (emphasis supplied)

However, it is well settled that where the Patent Office fails, as it did in the present case, to cite pertinent prior art that the presumption of validity is destroyed. And this court has so held.

Stoody v. Mills Alloys, 9 Cir., 87 F.2d 807;
Mettler v. Peabody Engineering Corp., 9 Cir., 77 F.2d 56;
McClintock v. Gleason, 9 Cir., 94 F.2d 115;
Gomez v. Granat Bros., 9 Cir., 177 F.2d 266;
O'Leary v. Liggett Drug Co., 6 Cir., 150 F.2d 656;
Norman Products Co. v. Sequoia Manufacturing Co., N.D. Cal. (1952) 107 F. Supp. 928.

The Patent Office having cited (R. 224) only the following prior art patents: FERGUSON (R. 225); TROWBRIDGE (R. 232); MORRIS (R. 238); THYS (R. 253) and GREAT BRITAIN (Gray) (R. 257), the presumption of validity is completely destroyed in view of the very pertinent prior art references relied upon by the appellee, referred to above. Especially is the Patent Office's failure to cite TRAPHAGEN, No. 1,358,481, (R. 369:15-30) significant in view of Traphagen's statement that the means of aligning one element adjacent to another on a bar or rod arrangement for anchorage was old and not too efficient in 1920!

It is difficult to think of a situation where the picturesque remarks quoted by Justice Lamm of the Missouri Supreme Court in the case of *Mackowik v. Kansas City,* 196 Mo. 550, 94 S.W. 556, with respect to the destroying of this type of presumption could be more applicable:

> "Presumptions * * * may be looked on as the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts."

Record Abounds in Grounds Supporting Invalidity.

The evidence before this Court even in its very limited form also discloses evidence sufficient to support the trial court's judgment of invalidity of the claims on many other grounds besides that upon which the trial court rested its judgment, namely, lack of invention.

In fact, it might be said that the record presents an embarrassment of riches (evidence) of invalidity. This abundance of grounds in support of invalidity of the claims adds to the incomprehensibility of the appellant's now alleged points on appeal and its argument.

And, of course, these grounds are available on appeal in support of a correct judgment or decree.

> *Peterson v. Coast Cigarette Co.*, 9 Cir., 131 F.2d 389;
> *Helvering v. Gowran*, 302 U.S. 235, 245, 58 S.Ct. 154, 158, 82 L. ed. 224.

The record and the opening brief of appellant are replete with stipulations to the effect that the patentee has overclaimed his invention. The appellant consistently insisting that the invention resides in the "twist instead of a clip to join steel wire hop picking fingers." (R. 28:2-5; Op. Br. 3) or, "it is this partial twist that Mr. Thys invented that he was given a patent on." (R. 211:31-(212)1).

As the claims call for a considerable number of other old "mechanical devices" (Op. Br. 9) and are not limited to the mere use of the old "mechanical device" of using "the coils of one of the prior art patents" as stated by appellant (R. 211) to eliminate the clip, the claims are conceded invalid as claiming more than the patentee invented.

Cf: *Great Atlantic & Pacific Tea Company* case, supra, at page 150, 340 U.S.; 71 S.Ct. at 129, citing *Bassick Mfg. Co. v. R. M. Hollingshead Co.*, 56 S.Ct. 787, 791, and *Carbice Corp. v. American Patents Dev. Corp.*, 51 S.Ct. 334.

Also, where a material element is omitted from the claimed combination, as it is in the present patent, the patent is invalid. No means is recited in the present claims whereby the picking finger is prevented from rotating around the finger bar when the machine is in operation. Such rotation would make the machine inoperative.

cf: *Great Atlantic & Pacific Tea Company* case, supra,

with respect to "clarity required of claims which define the boundaries of a patent monopoly (citing cases)."

Further, the claims are ambiguous, indefinite and incomplete and therefore invalid on this additional ground. The claims recite a complementary bend "including a partial encirclement" but fail to specify any thing else that the bends are alleged to be *including*. Also the claims recite such partial encirclement is of a *finger* of an *adjacent finger* but do not recite the means for accomplishing such encirclement or its method. Consequently the claims cannot be said to meet the clarity required of claims in order to define to the public the boundaries of the patent monopoly claimed.

cf: *Great Atlantic & Pacific Tea Company* case, supra;

Jacquard Knitting Machine Co. v. Ordinance Guage Co., 213 F.2d 503, at 506;

Application of Welch, 213 F.2d 555, 560;

Application of Schechter, (1953) 205 F.2d 185, 187.

The above do not constitute all of the grounds of record of invalidity that are available on appeal.

M. Swift & Sons v. W. H. Coe Mfg. Co., 1 Cir. 102 F.2d 391.

The trial court placing its decision on the broad ground of lack of invention, stating it was unnecessary to pass upon the other issues.

Inapplicability of Appellant's Cited Authorities Additionally Confusing.

Appellant makes reference (Op. Br. 25) to a number of authorities cited by this same appellant in co-pending Appeal No. 13,885, without stating their applicability to the point attempted to be made. The referred to authorities are summarily incorporated by appellant with no more than "* * * plaintiff adopts the rulings * * *." Since the inapplicability of the cited cases to any point attempted to be made in Appeal No. 13,885, is equally true in the instant case, the entire reference is doubly confusing.

The appellee has carefully read and analyzed the appellant's authorities. However, their applicability to any factual situation conceivably involved herein completely eludes the appellee. And, as the appellant has utterly failed to state wherein the appellant finds any such similarity between the facts of the present case and that of the cited reference, and wherein such authorities are contrary to the principles upon which the trial court held the claims of the patent at issue invalid, the appellee does not deem it necessary to burden this Court with a discussion of such unrelated authorities.

Further, the fact that the appellee has been unable to discover any possible merit whatsoever in the confused and ambiguous statements of the appellant with respect to its abortive points on appeal and alleged arguments in support thereof, a discussion of the appellant's cited authorities would appear only to add to the confusion already present in the entire brief of appellant.

The authorities of the appellee cited herein and those relied upon in the co-pending appeal No. 13,885, so completely support the judgment in both of these appeals that it is obvious that any authorities to the contrary must be distinguishable on their facts.

Consequently, the inapplicability of appellant's cited authorities add to the uninteligibility engendered by the contradictory statement of appellant's alleged grievances and lend support to the thought that this confusion was intentionally created in an effort to conceal the very frivolous nature of this appeal.

Section 103 Correctly Interpreted and Applied Herein by Trial Court

The authorities cited by the appellant with reference to the scope and effect of the provisions of new Section 103, Title 35, United States Code, are fully answered in the appellee's brief in co-pending appeal, No. 13,885, as follows:

> "Section 103 particularly specifies that the Court shall test the validity of a patent by determining whether: If 'a person having ordinary skill in the art to which said subject matter pertains' had all the prior art before him at the time the patent was applied for would 'the subject matter as a whole' of the alleged invention have been obvious?
>
> "(This section being but a practical test of the Constitutional requirements that for the patent monopoly the invention must contribute something additional to the science and arts.)
>
> "The record in this case establishes clearly and unequivocally that the answer to the above question is in the affirmative." (Brief for Appellee, Appeal No. 13,885, pp. 12-13).

(And the evidence of the homemade twist in the instant case (R. 103) also clearly establishes that such construction would have been obvious.)

"That Congress did not intend that the new Section 103 was anything more than a codification of the principles previously enunciated in such cases as the *Great Atlantic & Pasific Tea Company case*, supra; *Lincoln Engineering Company of Illinois v. Stewart-Warner Corporation*, supra; *Photochart v. Photo Patrol*, (9 Cir.) 189 F.2d 625, *Parker Appliance Co. v. Iracin W. Masters, Inc.* (9 Cir.) 193 F.2d 180; *Kalich v. Patterson Pacific Parchment Co.*, (9 Cir.) 137 F.2d 649, 651, 652 and cases decided on the principles of law set forth in these cases is succinctly pointed out in the case of *Stanley Works v. Rockwell Mfg. Co.*, (3 Cir.) (1953) 203 F.2d 846 (citing the decision of the present case with approval at page 849) in the following statement:

" 'On its face Section 103 is merely a codification of decisional patent law. The report of the Senate Committee on the Judiciary (Vol. 38, No. 8 Journal of Patent Office Society of August, 1953) leaves no doubt about this. In part that report states:

'Section 103, for the first time in our statute, provides a condition which exists in the law and has existed for more than 100 years, but only by reason of decisions of the courts. An invention which has been made, and which is new in the sense that the same thing has not been made before, may still not be patentable if the difference between the new thing and what was known before is not considered sufficiently great to warrant a patent. That has been expressed in a variety of ways in decisions of Courts and in writings. Section 103 states this requirement in the title. * * *'

"And, all cases decided subsequent to January 1, 1953, (effective date of Section 103), reiterate that this Section 103 adds nothing new.

New Wrinkle v. Watson, (D.C. Cir.) 204 F2d 35;

New Wrinkle v. Watson, (D.C. Cir.) 206 F.2d 421; cert. den., 74 S.Ct. 767;

Rock-Ola Mfg. Corp. v. Cusano, (3 Cir.) 206 F.2d 551;
Allied Wheel Products, Inc. v. Rude, (6 Cir.), 206 F.2d 752;
United Mattress Mch. Co. v. Handy Button Mch. Co., (3 Cir.) 207 F.2d 1;
Osborne Mfg. Co. v. Newark, (D.C. N.J.) 111 F. Supp. 846, 850;
Joseph Bancroft & Sons. v. Brewster etc. Co., (D.C. N.Y.) 113 F. Supp. 714; and
Lyons v. Construction etc. Co., 112 F.S. 317."

(Brief for Appellee, Appeal No. 13,885, pp. 18-20.)

Discernible Arguments of Appellant of Frivolous Nature.

At every conceivable point throughout its brief, particularly under its Statement of the Case, appellant keeps putting forward the doctrine of long felt need. In fact, the consistency with which the appellant brings forth this doctrine lends considerably to the confusion created in that it makes each argument appear as if it is nothing but a reiteration of the previous argument. There is, however, no evidence of record of any long felt need in the present case. The only evidence of the use of this finger is that of the appellant's witness Westlake. Mr. Westlake stated that the alleged infringing picking finger was not used on the large picker drums carrying the great majority of the picking fingers used by the appellee, but was only used on the arm picker and four small jump drums (R. 203:15-26).

And, the appellant's witness Kauth testified that the new fingers were not interchangeable with the old (R. 119-120). Consequently, it is evident that it was necessary for the appellee to purchase sufficient fingers to replace all the fingers on a given small picker drum or arm picker when the

old Horst type of picking finger was no longer available on the market.

In fact, this testimony establishes that the new finger is only purchased to the same extent that the old finger was purchased, namely, for replacement of broken fingers.

Nor was any evidence adduced that the appellant received any royalties under the alleged license agreement with Moxee City Warehouse (Rivard) to substantiate any such wide use which would naturally be attendant upon any long felt need being satisfied.

The holding in the recent case of *Application of McCarn*, (1954) 212 F.2d 797, at 799 is particularly applicable on this point.

> cf. *Toledo Pressed Steel Co. v. Standard Parts Co.*, 307 U.S. 350, 59 S.Ct. 897, 83 L. Ed. 1334, 1338.
> *Application of Felburg*, (1954) 211 F.2d 597.

Further, it is believed that for the appellant to avail itself of such doctrines as this and at the same time to have suppressed from the record such contemporary patents as that issued to Rivard (Moxee City Warehouse) the appellant appears to be having its cake and eating it too! Surely, if the appellant is permitted to urge to this Court that no one else but Mr. Thys thought of this idea of connecting picking fingers by twisting together their adjacent legs, then in all fairness the appellant should be allowed the reference Rivard, No. 2,428,321 (R. 30) to rebut this contention. The very fact that the Rivard patent was applied for within three months of the filing date of the patent at issue, indicates that there was some other reason why all of a sudden there was an interest in developing a new finger. It is believed that where the appellant relies upon such doctrine as this that it is incumbent upon the appellant to place of record the manufacturing conditions, the market demand,

etc., to establish that there were no market difficulties, no manufacturing difficulties or anything else that entered into the failure to place upon the market the device alleged to have met a long felt need.

The remarks of the Supreme Court in the *Toledo Pressed Steel v. Standard Parts* case, supra, are most applicable to the present situation.

In any event, it is the position of the appellee that the provisions of Rule 52(a) preclude this Court from giving consideration to such borderline doctrines. For certainly it cannot be said that the findings of the trial court are clearly erroneous if resort must be had to such borderline doctrines which are conceded to be applicable only in very close questions of validity. Therefore, it is believed that the only proper place for the weighing of and giving consideration to such borderline doctrines is in the trial court.

Equally fallacious in nature is the appellant's assertion (Op. Br. 19) that the appellee's counsel only agreed to finding 8 (R. 37) after the Court had ruled in her favor with respect to the showing in the Trowbridge patent (R. 232).

Inasmuch as the appellant had originally designated for inclusion in this record "Plaintiff's Amendments and Additions to Findings of Fact and Conclusions of Law", but later failed to include them in the record without permission of this Court, the appellee has placed them of record at this time by incorporating the same in this brief and placing them in the appendix hereof.

These proposed amendments (Appendix I of this brief) clearly establish that the appellee, in the interest of settling the findings and conclusions without undertaking a trip to Sacramento, conceded the narrow interpretation placed upon the Trowbridge showing by the appellant. However, the appellee has never agreed that Fig. 5 of Trowbridge

(R. 233) does not teach the joining of two adjacent similar picking finger legs whether they be of the same finger or of an adjacent finger. The appellee merely conceded the finding to be in accord with the statement of the Court contained in its Opinion which was referred to by the appellant in its suggested amendments.

It is believed, for the appellant to have made any reference to the proposed findings of the appellee; the findings as finally settled, etc., when the appellant had failed to print such necessary documents in the record herein, was for the purpose of distortion and misleading this Court.

In any event, there is no foundation for this argument of appellant (Op. Br. 19).

Perhaps nothing illustrates the frivolous nature of this appeal better than the remarks of the appellant (Op. Br. 2) wherein the appellant even endeavors to make an issue out of the fact that the appellee in her answer availed herself of the provisions of Rule 9 of the Federal Rules of Civil Procedure. The appellant urging that there is a "diametric conflict," (which appellee does not concede) between the defense of license and the appellee's prayer that the patent in suit be declared invalid and void.

And, the appellant (Op. Br. 20) urges to this Court that by such pleading this Court is to consider it as "evidence warranting the inference that she (appellee) deems the defense to be one of little worth."

It is difficult to conceive of any statement that could be more correctly construed as an admission on the part of the appellant that its appeal is frivolous than this unjustified and unwarranted abuse of the appellee for availing herself of the provisions of Rule 9 of the Federal Rules of Civil Procedure.

Trier of Facts Is Weigher of Evidence.

In the present case the trial court (R. 27:5) specifically stated that its opinion was arrived at "after a careful consideration of the testimony and the exhibits * * *".

This Court, with every other court, has so long held that the appellate court cannot weigh evidence and resolve doubts concerning conflicting testimony, that a citation of an authority for such a proposition seems hardly necessary.

Gillis v. Gillett, 9 Cir., 184 F.2d 872;

Columbia National Life Insurance Co. v. A. Quandt & Sons, 9 Cir., 154 F.2d 1006.

And this Court has particularly held that where the admissions and testimony of an *interested* party make a case of conflict of testimony, the effect of such testimony must be determined by the trier of the facts.

State Farm Insurance Co. v. Porter, 9 Cir., 186 F.2d 834.

A review of the limited record before this Court on appeal with respect to the testimony of the patentee Thys, President and Secretary of the appellant corporation, reveals so many contradictions that all conflicts must be resolved in favor of the judgment, the credibility of this witness having been passed upon by the trial court.

For example: on direct examination (R. 48:11) the witness Thys testified that, with respect to the complementary bends claimed in the patent, these "little crooks on the legs of the finger bar which appear near the angle of the fingers" are the complementary bends. This was with reference to the appellant's exhibit (Pl. Exh. 7-7A) which was alleged to be an embodiment of the finger assembly disclosed in Fig. 2 of the patent (R. 218).

However, on cross-examination in testifying with respect to the finger identified as the appellee's finger (Pl. Exh. 11 and 11A) this witness Thys said that the straight leg of the appellee's finger, i.e., that leg which merely has a bend at the juncture of the leg with the picking V-portion, likewise had a complementary bend on it. The witness contended that this "angle of the finger" was actually the same as the "little crooks" (R. 62:15-30).

Then, later, on being shown the embodiment of the old Horst finger (Def. Exh. C) the witness Thys reversed himself again and stated that the bend at the juncture of the leg with the V-portion of this straight leg finger was not a complementary bend (R. 85:12-25).

Here we have the president of the appellant corporation admitting that he is well aware that the "little crooks" or complementary bends referred to in his patent are "near the angle of the finger" but are not the angle of the finger. However, in order to charge the appellee with infringement the president of the appellant corporation states that the straight leg with the angle at the juncture of the leg with the V-portion constitutes a complementary bend which is required to be on *each* leg of his finger in accordance with the claims.

Next, we have this witness stating on direct examination that the advantage of eliminating from the picking bar assembly the use of "clamps, ties, pins or other fastening means" is the object of his invention and is accomplished by the use of a pivot pin or assembly bar (R. 48:219: Col. 2).

Then we have this witness stating on cross-examination that the appellee's method of having a hook attached to the end of a finger and this hook being inserted into a wooden finger bar with a metal strip across the top of such finger bar, and metal staples used to secure the strip to the finger

bar to fasten the fingers individually is the same as the means called for in his claim (R. 61-62).

It is interesting to note that on redirect-examination (R. 96-97) that this witness, by means of very leading and lengthy questions to which the witness was only required to answer "yes", went even further in throwing overboard its alleged improvement of anchoring means in an effort to establish that the appellee's finger was the same as that disclosed and described in the patent in suit.

It is reiterated, that the above reference to the testimony of the witness Thys is but a small portion of the many contradictions found throughout the record with reference to this witness' testimony.

Consequently, only the trial court can determine the credibility of this witness from the witness' demeanor, etc., with respect to the remainder of his testimony.

And, it should no doubt be observed at this point that the appellant's counsel's attempt to discredit the expert witness Trabucco was unavailing.

The appellant on the very meagre record presented by it argues that the expert Trabucco did not understand the teaching of the Trowbridge patent with respect to Fig. 5 (R. 232). However, it is significant to note that appellant's counsel (R. 190:15-23) endeavored to suppress the fact, by constantly interrupting the witness, that the Patent Office examiner agreed with the expert Trabucco that this Fig. 5 does teach the joining of adjacent legs by twisting and interlocking. And the appellant did not place before this Court in the printed record the file wrapper of the patent, after having designated it, to show exactly what the Patent Office examiner found with respect to this Fig. 5 of Trowbridge (R. 233), nor did the appellant place before this Court any

portion of that file wrapper with reference to the claims in suit.

Further, this might be as well as any point to direct this Court's attention to the fact that while the appellant has much to say about the absence of first-hand knowledge on the part of the expert Trabucco with respect to the equipment involved, the appellant finds no difficulty in this regard with respect to the Patent Office examiner, who it is doubtful had any first-hand experience at all, even to having seen such type of equipment even once. And, it would also appear that the appellant's counsel likewise has had little experience with this type of equipment. We find counsel making such remarks as he does not understand what is meant by a jumper drum or arm picker (R. 203) and similar remarks throughout the transcript; such as quarreling with the expert Trabucco for using the word "similar" (R. 198) and then employing the same term in describing the device to the Court (R. 211:24-30).

CONCLUSION.

It is submitted that the appellant having failed to comply with this Court's rules on appeal as well as Rule 75(d) of the Federal Rules of Civil Procedure, has presented nothing for this Court's consideration and, further, in view of the over-abundance of the evidence in support of the trial court's findings, conclusions and judgment that the claims of the patent in suit are invalid, judgment of the trial court on this issue of invalidity should be affirmed.

Cross-Appeal

Appellee's Specification of Errors.

Appellee's Statement of Points on Appeal (R. 215-216) and specification of errors upon which appellee relies are as follows:

I. That the plaintiff-appellant herein was guilty of inequitable and unconscionable conduct by the instigation of this action; (This brief, p. 54)

II. That the plaintiff-appellant admittedly was aware that the patent sued upon was of doubtful validity; (p. 56)

III. That the plaintiff-appellant was aware that the Patent Office had refused and disallowed a claim admittedly covering the identical structure of the alleged infringing device; (p. 64)

IV. That the sole purpose or primary purpose in instigating this action was to vex, harass and oppress the appellee with a multiplicity of patent suits; (p. 66)

V. That the plaintiff-appellant was aware or should have been aware that the alleged infringing devices were purchased from a licensee of the appellant; (p. 70)

VI. That the lack of probable cause in the instigation of the action and the manner in which the action was prosecuted, makes it manifestly unjust and grossly inequitable that the appellee should be left to bear the heavy burden of appellee's counsel fees; (p. 74) and

VII. That the trial court erred in refusing to appellee findings of fact and conclusions of law awarding reasonable attorneys' fees to appellee, and erred in the omission of an award of reasonable attorneys' fees to the appellee in the final judgment. (p. 77)

Appellee's Argument in Support of Appeal Points.

The appellee will now discuss the above points on cross-appeal in their numbered order.

I

Section 285, Title 35, United States Code, (former Section 70) provides that the prevailing party may be

awarded reasonable attorneys' fees in exceptional cases.

The new wording of this section is but a codification of the principle previously established by case law for the exercise of judicial discretion in making such an award, namely, an "exceptional" case.

In defining the word "exceptional", it has been held that such a case has been made out where the facts establish that the losing party has been guilty of some inequitable or unconscionable conduct, or unfairness or bad faith in the conduct of the litigation, or some other inequitable consideration, which makes it grossly unjust that the prevailing party be left to bear the burden of his own counsel fees.

Blanc v. Spartan Tool Co., 178 F.2d 104;
Dubil v. Rayford Camp & Co., 184 F.2d 899 (9 Cir.);
Park-in Theatres v. Perkins, 9 Cir., 190 F.2d 137;
Brennan v. Hawley Products Co., 98 F. Supp. 369.

And bad faith or inequitable conduct on the part of the losing party is established where the evidence shows that there was an awareness on the part of the plaintiff that there was no justification for bringing the action; where the primary purpose of the action was to vex, harass and oppress the defendant or prevailing party; where the patent is of doubtful validity and known to be so by the plaintiff, and similar situations. All as held in the immediately preceding cited authorities.

The record herein establishes that all of the above mentioned circumstances exist in the present case. The plaintiff-appellant was well aware that the patent sued upon was of doubtful validity on many grounds; that the Patent Office had refused and disallowed a claim admittedly covering the identical structure of the alleged infringing device; that the plaintiff-appellant recognized the source from which the appellee secured her fingers to be that of the admitted

licensee of the appellant; that the appellant admittedly threatened this infringement action and brought the same under circumstances which clearly establish that the threats of the suit and the actual filing of this suit simultaneously with the filing of the third action entitled *E. Clemens Horst Company v. Sophie Oeste,* 114 Fed. Supp. 408, said action also being decided in favor of the appellee (Horst Company is the other appellant in the co-pending appeal No. 13,885 between these parties), was for the sole purpose of trying to force a settlement in the previously filed case, now appeal herein as No. 13,885, between these parties.

II

That the patent in suit was well known by the appellant to be of doubtful validity on a number of grounds is well established by the record herein.

First, the patent was known to be invalid by the appellant on the grounds of over-claiming the invention (see this brief, pp. 5, 17), the appellant disavowing invention in anything but the "twist * * * this complementary bend." (R. 211:31); (R. 28); (Op. Br. 3):

E. V. Prentice Co. v. Associated Plywood Mills, (D.C. Or.) 113 F. Supp. 182, 183, 186;

Great Atlantic & Pacific Tea Co. case, supra, 340 U.S. at page 150, 71 S.Ct. at page 129;

Patent Valve Co. v. Robertsham-Fulton etc. Co., 6 Cir., 1954, 210 F.2d 146 at 152.

Second, the appellant was well aware that the patent was invalid as claiming more than the patentee invented on additional grounds, namely, on the grounds that the claims were admittedly so broad as to cover the means of securing or anchoring a picking finger to a finger bar by "the use of clamps, pins, ties or other fastening means for the individ-

ual fingers," which method of securing the fingers the patentee particularly represented to the Patent Office he was obviating (R. 219; col. 2:31-32). As a consequence, it could not be said that the patent was regularly and duly issued as it did not meet the requirements of Section 33 of Title 35 of United States Code, as a condition precedent to the patent grant by particularly pointing out to the Patent Office wherein the invention resided (New Section 112, Title 35, U.S.C.).

And, as stated in the recent case of *S. D. Warren Co. v. Nashua Gummed and Coated Paper Co.*, 1 Cir., 1953, 205 F.2d 602 at 605: "The obvious purpose of this doctrine is to prevent a patentee from obtaining a monopoly over a wider area than he has pioneered."

Cf. *Patent Valve Co. v. Robertsham etc.*, supra.

The patentee Thys, president of the appellant corporation, in company with his herein patent counsel, visited the appellee's ranch in September, 1951 (R. 52) and observed the method employed by the appellee for securing her picking fingers to a picking bar. And the appellee's method *did* employ "the use of clamps, ties, etc.".

Therefore, both the appellant and the appellant's counsel were aware that the claims of the patent were invalid if they were drawn so broadly as to "obtain(ing) a monopoly over a wider area than he (Thys) has pioneered."

If, on the other hand, the patentee Thys and his patent counsel appreciated that this method employed by the appellee was not within the scope of the claims, then there was no basis for bringing the infringement action, and it was admittedly brought in bad faith.

However, the appellant at the trial insisted that this method of securing appellee's picking fingers to the finger

bar was the method which was covered by the claims of the patent in suit (R. 223 (Claim 19) col. 9:65-67).

Another, or *third ground,* upon which Claim 19 of the patent in suit is invalid for lack of clarity required by the patent statutes (35 U.S.C.A., Section 33 (New Section 112)) is the appellant's contention at the time of the trial that the appellee's finger bar structure contained all of the "mechanical devices" (Op. Br. 9) required to make up the claims of the patent in suit. The patentee Thys, as well as appellant's patent counsel who processed the application which matured in the Letters Patent at issue herein, were aware from but a casual observation of the appellee's machine at the time of their visiting her ranch (R. 52), that the appellee's finger bar structure could not even be modified to resemble the alleged invention of the patent at issue.

It was obvious to the appellant and its counsel that the appellee's picking fingers are not provided with coils on the legs for the purpose of securing the fingers to any other element (R. 101:10-13), nor could the coils conceivably be "adapted for slidable reception of a *finger bar"* as claimed in the patent, especially Claim 19 (R. 223, col. 9:65).

And, any attempt to substitute the method of merely inserting the finger bar (which would have to be changed to one round in form; rather than rectangular as presently used by the appellee) slidably through the hollow coils, provided on the legs of the appellee's picking finger, for the present method used by the appellee for anchoring her fingers to a finger bar (consisting of hooking the individual fingers into a rectangular wooden finger bar, placing a continuous metal strip over the top of the finger bar and over the fingers so hooked and then attaching the metal strip to the finger bar by means of metal staples driven through the metal strip into the wooden finger bar, thus individually

securing in a relatively fixed position each picking finger to the finger bar), would make the appellee's machine inoperable; the fingers would perform no useful function as they would then move or rotate around the finger bar (rod) by the pull of the vines, rather than remaining, as provided in appellee's machine, in a substantially fixed position whereby the fingers will be caused to comb or snare the hops free from the vines as the vines are pulled past the drums to which the finger bars are attached.

It is clear, therefore, that the appellee's device did not and does not embody all of the "mechanical devices" alleged to comprise Thy's alleged invention (R. 61:26-(62) 4). Although Thys did endeavor to give the impression to the trial court that complete anchoring means as called for in his claims was to be found on the appellee's finger structure (R. 59-61; 66:20-(67)9; 86:24-32).

Therefore, we have the appellant either admitting that the claims are invalid as not meeting the requirements of the patent statutes and known to it to be insufficient for lack of clarity. (*Application of Schechter*, 1953, 205 F.2d 185 at 187, holding that the former Section 33 of Title 35 U.S.C. and new Section 112 of the same title are in practical application the same), or, on the other hand, we have the appellant admitting that it was well aware that the appellee's structure did not come within the provisions of the claims of its patent and there was no probable cause for the instigation of this present action.

Further, Mr. Thys, the brother-in-law of E. Clemens Horst, Jr., the other appellant in the co-pending appeal No. 13,885, has long been aware of the legal principles upon which the two patents involved in this appeal and Appeal 13,885, entitled *Thys Company and Horst Company v. Sophie Oeste*, were declared invalid. Consequently, if the

holding in the case of *Lincoln Electric Co. v. Linde Air Products Co.,* 74 F. Supp. 293 at 294 is sound, then the converse must be sound, namely, that where the decisions of the Supreme Court are of long standing upon which a patent is held invalid, a patentee is undera duty to scrutinize his claims with respect to such legal principles.

In the case of *E. Clemens Horst Company v. Gibbens & Blodgett,* D.C. Cal. 50 F. Supp. 607, particular attention was directed to the principles enunciated in the *Lincoln Engineering case,* supra, and, appellant's counsel is familiar with the *Great Atlantic & Pacific Tea Company case,* supra, as well as the *Toledo Pressed Steel v. Standard Parts,* supra, as established in *Photochart v. Photo Patrol,* 9 Cir., 189 F.2d 625.

In fact, the appellant admitted it was well aware that the patent in suit did not meet the test laid down by the Supreme Court in the *Lincoln Engineering case*, supra, and the authorities referred to in the immediately preceding paragraph, but was gambling on some ill conceived notion that these cases were decided at a time when *"it was very fashionable for patents to be held invalid"* (R. 208) or at a time when *"patents were persona non grata"* with the courts, and that in 1952 the appellant, pursuant to this announced theory, was of the opinion that *"in our economic system the pendulum"* had swung in its favor (R. 208:16-(209)3;27:15).

It is, therefore, abundantly clear that the appellant oppressed the appellee herein, and continues to oppress this appellee on an admittedly frivolous concept of the place that case law occupies in our judicial system.

The patentee Thys likewise was particularly aware that the patent was of doubtful validity on a *fourth ground.* Mr.

Thys failed to disclose to the Patent Office his knowledge that homemade twists (R. 101), were used in the same manner as Trowbridge, Fig. 5 (R. 232) to join the adjacent legs of adjacent picking fingers of the old Horst type (Def. Exh. C). For, while his specification goes into considerable detail to build up the alleged Thys' invention by reference to certain prior art devices and patents, it is significant that no mention is made of this practice (homemade twists) by the growers.

Further, on Mr. Thys' direct examination no reference is made of the use of these homemade twists to the trial court, nor is any explanation offered for this omission after his knowledge of the same was brought out on his cross-examination (R. 103). Such as, that Mr. Thys was of the opinion that inasmuch as the same was not covered by any prior patent to the Horst, Thys, or Miller patentees that he did not consider it prior art, although ample opportunity was afforded him to do so if he had any such explanation, or any other explanation whatsoever that he could make in good faith.

Consequently, to have represented to the trial court as well as to the Patent Office that he, Mr. Thys, was the first person to have ever conceived of the idea of eliminating the method of joining picking fingers by removing the clip and twisting the fingers together was known to him to be false.

Fifth, the patentee Thys was aware of the doubtful validity of his patent in claiming more than he invented with respect to slidability.

It is significant to note that the structure of the bends as called for in the claims of the patent in suit contain adverse terms. The claims speak of "interlocking" at the same time speaking of "slidability." (Claim 21) (Op. Br.

Appendix A). To interlock something prevents it from being slidable. The fingers might be rotated out of an interlocked position, they cannot be slidably removed from one another.

Cf: *Patent Valve Co. v. Robertsham etc.,* 210 F.2d 146 at 152.

That Mr. Thys, the patentee, appreciated this defect in the claims of his patent is shown by his reluctance to operate the model of three picking fingers (Def. Exh. D) made up in conformity with the illustration of Fig. 2 of the patent in suit (R. 218). Mr. Thys made it quite clear that his invention apparently resides in something quite different in nature from Fig. 2 of his patent because he objected on the grounds that he was not familiar with this particular device (R. 76-79).

This defect in the Thys structure is admitted also by the appellant by the fact that the appellant does not use the type of finger illustrated in this model of three picking fingers (Def. Exh. D) and the alleged embodiment of the Thys' invention (Pl. Exh. 7-7a) of record herein (R. 48). But, rather, the appellant uses the same type of finger as the appellee and one which is admittedly an embodiment of rejected Claim 27 which the Patent Office rejected on the basis of the previously rejected claims of the application as well as Gray in view of Trowbridge (R. 74:25-30).

The appellant's bad faith with respect to this rejected Claim 27 is discussed in following point III on appellee's appeal.

Sixth. As the means for joining the fingers one to another and the means for anchoring the fingers on a finger bar have no interdependency, but are separate and distinct as to function, the claims are invalid.

Cf. *Dukes v. Bauerle,* 41 F. 778, 780, 781.

That this ground of invalidity was well known to the appellant is also established by the appellant's repeated insistence that the anchoring means be read out of the claims.

It is submitted, therefore, that the appellant was well aware that there was no basis for the institution of the patent infringement suit against the appellee and that the same was done in bad faith.

While this Court stated in the case of *Dubil v. Rayford Camp & Co.*, 184 F.2d 899, 9 Cir., that it appeared to the Court that only the United States could bring an action to invalidate or cancel a patent which was procured by the practice of fraud on the Patent Office, nevertheless this Court felt that where such fraud was found by the Court it was sufficient to support a grant of reasonable attorney's fees to the prevailing party on the basis that the plaintiff knows that it is not justified in bringing a patent infringement suit.

Where the patentee, as in the present instance, invalidates his own patent by disclaiming all but one element of a combination of old "mechanical devices" (Op. Br. 9) which were originally alleged to make up the invention and are set forth in the claims sued upon, as well as where a patentee, as herein, suppresses and fails to present to the Patent Office the fact of such general practice in the art of homemade twists of joining fingers together and thus eliminating a clip, it must be found that the patentee practiced fraud on the Patent Office in the first instance.

The trial court in holding the claims in suit invalid on the broad ground of lack of invention, did not pass upon the above referred to additional grounds of invalidity. However, the appellee is entitled to have this Court consider

the same on this appeal. (cf: authorities cited, this brief page 41:12)

III

The patentee, president and secretary of the appellant corporation herein, admitted at the trial that the appellee's finger structure, which appellant alleged was an infringement of its Letters Patent, was in fact the same structure as that set forth in rejected Claim 27 in the application for the Letters Patent (R. 73:24-(74)12).

And, the record further establishes (R. 74:21-30) that the Patent Office disallowed this structure in the following language:

> "The entry of the amendment filed under Rule 78 is not recommended on the ground that the claims presented do not patentably distinguish over the structure of the references Gray taken in view of the patent to Trowbridge and the *previously rejected claims.*" (R. 74:25-30) (Emphasis supplied).

The patentee Thys acquiesced in this rejection and the patent was issued without any such claim.

Nothing could be clearer—the *appellee's* alleged infringing structure was found by the Patent Office to be nothing more or less than a modification of the British patent issued to Gray (R. 258) taken with Trowbridge (R. 232).

And, in making this rejection, it is also significant to note that the Patent Office directed particular attention to the fact that Claim 27 was rejected on the same ground as "the previously rejected claims" that had attempted to cover the structure of the appellee's alleged infringing finger.

Now, it should be remembered that this factual situation was well known both to the president of the appellant corporation and patentee, and its counsel herein; appellant's

counsel being the same counsel that processed the application that matured into the Letters Patent in suit.

Consequently, when Mr. Thys in company with his counsel herein visited the appellee's ranch in September, 1951 (R. 52) they were both well aware that the appellee's finger was the finger structure which the Patent Office had refused to grant a monopoly upon to Mr. Thys; namely, Claim 27, inter alia.

Therefore, it cannot be denied that either the appellant brought the action in bad faith, well knowing that the alleged infringing structure was not covered by any claim of the patent in suit, or, the conduct of the appellant in insisting that his claims cover the alleged infringing structure of the appellee's device, has thereby admitted that the patent was irregularly issued. As two things equal to the same thing are equal to each other and the claims at issue are all invalid and were known to Thys to be invalid as being nothing more nor less than rejected Claim 27 (R. 73: 24-(74)12).

In any event, it constituted more than unconscionable conduct on the part of the appellant in charging the appellee with infringement under the above circumstances.

It might also be well to note at this point that in the very recent case of *Application of Dufault*, 214 F.2d 181, at 184, the Court directs attention to the duty of the patentee to study carefully the claims as issued in his patent and, moreover, that it is the further duty of the appellant or patentee where he does not understand the language of his claims to call upon an expert to explain them. This *Dufault* case, of course, deals with reissue. However, if a patentee in seeking a reissue of his patent is under a duty to study his claims at the time the patent is issued and to employ expert

counsel if he does not understand them, surely then a patentee, before he involves another person in as expensive litigation as this has been, has even a greater duty to study his claims and secure expert advice in the event he does not understand them.

This above referred to evidence on the part of appellant, with respect to rejected Claim 27, clearly establishes bad faith of the highest order on the part of the appellant in bringing the present infringement action as well as prosecuting the present appeal. And the appellee submits that this evidence standing alone establishes an abuse of discretion on the part of the District Court in failing to find and award the appellee reasonable attorneys' fees in this action as it is well within the type of exceptional case referred to in Section 285, Title 35 U.S.C., and the cases interpreting this section.

IV

That the sole or primary purpose which motivated the appellant in instigating this action was to vex, harass and oppress the defendant-appellee with a multiplicity of patent suits is well established by the record herein. The abundancy of this evidence establishes that the present case is a most exceptional case and therefore makes the provisions of Section 285, Title 35, U.S.C., providing for the allowance of reasonable attorney fees to the prevailing party, almost mandatory.

The appellee will not burden this Court with a detailed statement of all this evidence, but will direct this Court's attention to only one small portion which, even standing alone, is more than sufficient to establish the bad faith on the part of the appellant in instigating this action.

Before specifically pointing out this evidence, reference is made to the fact that it has long been well established

that due notice to the defendant requires the same facts as constitutes sufficient notice to the public. Where plaintiff relies upon notice to the defendant, "proof must be made no less definite and certain than that required where he elects to rely upon notice to the public." And such notice must be given to the defendant personally in the same manner as required for the service of a complaint.

Smith v. Dental Products Co., 140 F.2d 140, 152;
Parker Rust Proof Co. v. Ford Motor, 23 F.2d 502, 503.

That the appellant herein was and is well aware of the showing required (by the above authorities) to establish notice to the public of its claimed patent monopoly is attested to by the allegations found in its complaint on file herein (R. 4(5).) Consequently, the appellant's reason for placing of record the evidence about to be referred to completely eludes the appellee. However, it is significant to note that for whatever purpose this evidence was offered by appellant it does succinctly disclose the real motive behind the appellant's action in bringing this infringement suit against the appellee.

Mr. Townsend, the patent counsel who processed the application which matured into the Letters Patent in suit, and one of the counsel herein for the appellant, testified (R. 105) that he and Mr. Thys (the patentee), on September 5, 1951 (R. 52) visited the appellee's ranch in connection with the co-pending appeal No. 13,885, in the company of a draftsman from his (Mr. Townsend's) office, together with a photographer from the Curry shop (Sacramento), and at that time (September 5, 1951) he and Mr. Thys observed the alleged infringing finger of the appellee involved in this present action.

Mr. Townsend admitted however that it was not until March 10, 1952 (R. 105:24) that any mention was made of

this alleged infringement, and that such mention was made only at a time when he (Mr. Townsend), was aware that patent counsel for the appellee was ill and unable for an indefinite period of time to give advice with respect to any such charges of infringement and threatened action (R. 128: 10-15). And no explanation was offered by Mr. Townsend for the nine months delay between the time of observing the finger i.e., September 5, 1951, and March 10, 1952.

However, on cross-examination of Mr. Townsend, his subconscious revealed the purpose for making the charge of infringement at a time when patent counsel was not available (R. 107). Mr. Townsend, in being questioned as to any notice that he had given patent counsel for Miss Oeste, between September 5, 1951 and March 10, 1952 relative to this charge of infringement, replied that he had not because he recalled "that all matters concerning *settlement* were to be referred to Mr. Curtright." This testimony is as follows:

> "Q. You had not at any time after September 5, 1951, until the date of the commencement of the action notified White & White that Miss Oeste was *infringing* a picking finger patent, Mr. Townsend?
>
> A. I don't recall that I did, Mr. White. Your recollection may be better than mine on that. I do, however, recall that all matters concerning *settlement* were referred to Mr. Curtright by your office.
>
> Q. Yes, but my question was directed to the fact whether or not you actually advised White & White that the defendant was infringing a picking finger.
>
> A. I don't recall.
>
> Q. (Continuing): * * * prior to the commencement of this suit?
>
> A. That is correct." (Emphasis supplied)

During Mr. Townsend's direct testimony as well as his cross-examination (R. 104-109) there was no evidence offered that Miss Oeste, herself, as required by the patent statutes, had ever been personally contacted; nor had the

patent numbers ever been given or referred to during any conversation at any time with counsel then representing Miss Oeste; or had anything remotely resembling adequate notice been given.

However, as stated above, whatever the purpose of offering this evidence was on the part of the appellant, it is clear that it does establish that the real motive in bringing this action was to force settlement of the then pending action between these parties through the threat of vexatious litigation.

Further, Mr. Thys testified (R. 51-52) that when he saw the appellee's alleged infringing picking finger (Pl. Exhs. 11-11a) on her ranch on September 5, 1951 that he recognized the picking finger as being one manufactured by the California Spring Company "who manufacture the fingers for Moxee City Warehouse" (R. 51-53). Thys also testified that he was familiar with the Moxee City Warehouse finger (Pl. Exh. 8) which he first saw in 1950, prior to entering into an agreement with the Moxee City Warehouse in 1950 (R. 131:11-25).

The appellant offered no explanation for the delay of nine months before even mentioning the matter of the finger to the appellee's general counsel in Sacramento, at a time when patent counsel was ill. The explanation obviously resides in the fact that the patentee Thys was well aware when he first saw the finger, September 5, 1951, that it was from his licensee and there was no basis for a charge of infringement (R. 49-52).

Thereafter, the appellant filed the present action together with the action entitled *E. Clemens Horst Co. v. Sophie Oeste*, 114 F. Supp. 408, which latter action was also decided in favor of the appellee herein and the patent in suit declared invalid.

This action, *E. Clemens Horst Company v. Sophie Oeste,* supra, was not appealed. However, it is significant to note that in this second action brought by E. Clemens Horst Company against Miss Oeste, the patent involved was the same with respect to which the District Court at Sacramento had previously expressed grave doubts regarding its validity, in the case of *Horst Company v. Gibbens & Blodgett,* D.C. Cal. 50 F. Supp. 607.

In fact, looking at the litigation record as a whole with respect to the appellant herein (Mr. Thys is the brother-in-law of Mr. E. Clemens Horst), it does give rise to a surmise that there has been an attempt on the part of these litigants to prolong the benefits flowing from the early Horst patents by the securing of the "gadget" type of patent that has now been held invalid by the Courts. Nevertheless, as understandable as this motive may be, it cannot be condoned, much less encouraged.

It is submitted that this evidence of using a threat of infringement actions in an attempt to force a settlement in pending litigation between the parties establishes bad faith of the highest order and that there was an abuse of discretion on the part of the District Court in failing to award the appellee herein reasonable attorneys' fees as prayed for.

V.

There was absolutely no probable cause for the bringing of the action on the alleged infringing structure, as appellee purchased all of the alleged infringing picking fingers from an agent of appellant's licensee.

Now, as set out above, Mr. Thys, the patentee, and his patent counsel herein immediately recognized the appellee's picking finger on September 5, 1951, as being the finger sold by Moxee City Warehouse (R. 49-41). As the appellant was well acquainted with this finger (only one year before

the visit to the appellee's ranch), with infringement of the patent in suit by the sale of said type of finger.

The record establishes that all but 24 picking finger bars (R. 123-124) were purchased by the appellee after March 10, 1950, the date of the license agreement (R. 131) between Moxee City Warehouse and the appellant, and the record further establishes that the appellee purchased all of the alleged infringing picking fingers from an agent of Moxee City Warehouse, namely, Kauth Bros., of Santa Rosa, California (R. 203; 119:16-21).

There is no evidence of record that the appellant did not receive its royalties on the alleged infringing picking fingers purchased by the appellee from appellant's licensee after March 10, 1950. And under the agreement (R. 131), it must be assumed that such royalties were paid, as the agreement particularly states the royalties shall be paid on all fingers *purchased* after March 10, 1950. And, also, the agreement further provides that the appellant shall receive *a copy of all the purchase orders* under the agreement. There is no evidence of record either that the appellant did not receive a copy of the appellee's purchase orders from its licensee Moxee City Warehouse.

As stated by the United States Supreme Court in *Interstate Circuit v. United States*, 306 U.S. 208, 226, 59 S.Ct. 467, 83 L.Ed. 610, "Silence then becomes evidence of the most convincing character. (Citing numerous cases)." Or, as held by the United States Supreme Court in the case of *Kirbey v. Talmadge*, 160 U.S. 379, 383, 16 S.Ct. 349, 40 L.Ed. 463, "All evidence * * * is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted." Or, as also held by the United States Supreme Court in the case of *Clifton v. United States*, 4 How. 242, 247, 11 L.Ed. 957, 959. "The production of weak evidence when strong is

available can lead only to the conclusion that the strong would have been adverse."

If Moxee City Warehouse had been remiss in forwarding any royalty payments to the appellant, it was a matter between the licensee and licensor and not one involving the appellee third party. The appellee in purchasing her fingers from an authorized agent of the licensee of the appellant was entitled to rely upon the holding out to the public that the agent was entitled to sell the fingers under the license agreement of March 10, 1950 (R. 131).

Once the royalty is provided for, the device is free of the patent monopoly and there is no basis for a charge of infringement.

Hobbie v. Jennison, 149 U.S. 355, 362, 13 S.Ct. 879, 880, 37 L.Ed. 766, 768;

U. S. v. Univis Lens Co., 313 U.S. 241, 252, 62 S.Ct. 1088, 1094, 86 L.Ed. 1408;

Jackson v. Vaughan, 9 Cir., 73 Fed. 837, 839.

Next, turning to the 24 bars purchased by the appellee prior to the license agreement between the appellant and Moxee City Warehouse, namely, the purchase made on July 15, 1949 (R. 124) there is no evidence of record that these fingers have been used after May, 1950 or the date of notice, namely, June 6, 1952.

The testimony of the appellant's witness Kauth clearly established that the appellee could not have been using such fingers after May 19, 1950 (R. 123). Mr. Kauth testified that the fingers sold in 1949 were different from those which were sold in 1950 and that they could not be interchanged (R. 120:8-19). Further, there is no testimony offered by appellant than when Thys and counsel visited the Oeste ranch that they at any time observed the appellee using the picking finger of the type sold in 1949. Rather, the testimony as pointed out above is all to the effect that Mr. Thys

immediately recognized the fingers on the Oeste machine as being sold by his licensee Moxee City Warehouse and the same finger type that Mr. Thys, himself, purchased from Moxee City Warehouse and uses (R. 94:23-27).

The testimony of the appellant's witness Westlake confirms that such early purchased fingers were not being used after May, 1950, or after the giving of notice of infringement by the filing of this action on June 6, 1952.

This testimony is as follows: The appellee only uses the alleged infringing type of picking finger on her small arm picker and small jump drums, but does not use such fingers on the large main drums of her equipment where the majority of the picking fingers are placed (R. 203:14). Mr. Westlake testified that the appellee's machine has 10 little drums on the arm picker (R. 203:18-20) and that each of the arm picker drums carries 20 picker bars (R. 204); and he further testified that the 4 small jump drums on the appellee's machine likewise are equipped with the alleged infringing finger and that these small jump drums carry 12 bars (R. 203-204).

In July, 1949 (R. 124), the appellee purchased sufficient picking fingers to replace all the finger bars on 2 of the small jump drums, or 24 bars; there being 12 bars to a drum.

In May, 1950, the appellee replaced these picking finger bars by purchasing 24 bars of the new type as testified to by the appellant's witness Kauth (R. 120:8-19; 123:31).

Also, on May 11, 1951, the appellee purchased sufficient finger bars to replace all of the bars on the 10 small drums of the arm picker, which said drums carry 20 bars to the drum, or 200 bars for the 10 drums, and purchased as well an additional 25 bars for the 2 remaining small jump drums, carrying 12 bars to the drum or 24 bars in all.

In other words, analytically, the evidence is:

1. Equipment using alleged infringing finger:
   (a) 4 small arm picker drums having 12 finger bars each, or..... 48 bars
   (b) 10 jump drums, having 20 finger bars each or..200 bars

   Total number of bars machine equipped with.....248 bars

2. Alleged infringing fingers purchased:
   (a) July 15, 1949, 24 bars or a sufficient number to equip only 2 small arm picker drums, having 12 finger bars each (R. 124).....Replaced May 19, 1950
   (b) May 11, 1951, 225 bars purchased, or a sufficient number to replace the finger bars on the 10 jump drums or 200 bars and 2 arm picker drums of 24 bars (R. 124).....225 bars
   (c) May 19, 1950, 24 bars purchased, or enough to replace the previously purchased 24 bars in July, 1949 (R. 123:31).....24 bars

   Total bars purchased and used after May, 1950.....249 bars

Since it is well established that damages are not recoverable without due notice of the patent having been given, and the record herein is barren of any evidence that such due notice was given prior to June 6, 1952, the date of the filing of the action, and the record further establishing there was no alleged infringement by the appellee after May 19, 1950, there was patently no probable cause for the bringing of the action. And the record establishes such was well known to the appellant.

VI

That the appellant was well aware that there was no probable cause for the instigating of this action is shown by the testimony of the appellant's president, Mr. Thys, who contradicted himself in such a manner as to amount to outright perjury.

Mr. Thys, as noted above, stated unequivocally and clearly that on September 5, 1951, when he first saw the alleged infringing finger of the appellee he recognized its source instantly (R. 51-52). This, of course, he could not have denied in view of his accusations against the Moxee City Warehouse people in 1950 that he considered this finger to be an infringement of the Letters Patent in suit (R. 49; 131), and, also, by reason of the fact that Mr. Thys purchases the fingers he uses from Moxee City Warehouse (R. 94:23-25). Mr. Thys also testified that in June and July of 1951 (prior to seeing the appellee's alleged infringing finger), he contacted the Dauenhauer Manufacturing Company at Santa Rosa (R. 50-51), and was, therefore, well acquainted with the type of finger being manufactured by the Dauenhauer Manufacturing Company. (This finger of the Dauenhauer Manufacturing Company can be observed at but a glance to be a wider and heavier finger than that manufactured for the Moxee City Warehouse people by the California Spring Company at Los Angeles (R. 49-50) (Pl. Exh. 12).

[And, it is significant to note, that the appellant made no effort to take the deposition of Mr. Florian Dauenhauer, d/b/a Dauenhauer Manufacturing Company, but left this chore to the appellee (R. 109:23-26). However, at the time of the trial, the appellant on its case in chief (showing the importance of this evidence to the Court), endeavored to give the impression that the appellant had taken this deposition and that the appellant was only too eager to place before the trial court all of the evidence. The appellant went so far as to take the exhibits from the appellee's deposition and introduce them as its own under such designation as "Plaintiff's Exhibit 12, the Dauenhauer Manufacturing finger." (R. 111:29-32)

Anyone can tell by merely a glance at the exhibit referred to (Pl. Exh. 12) and the alleged infringing finger (Pl. Exh. 11-11A) that they are not of the same manufacture. Therefore, the witness Thys (a man who is in his middle 50's and employed in the hop growing-picking industry for the last 20 years), as well as his patent counsel, were not in the least misled as to the source of the appellee's picking finger.]

Yet this witness Thys told the trial court he was under the impression that the appellee's finger was of the Dauenhauer manufacture! (R. 55:6-11).

That the witness Thys believed it necessary to go to such great lengths in an effort to hoodwink the trial court clearly establishes the guilty conscience of the witness.

Further, it is significant to note that in charging Mr. Florian Dauenhauer with infringement of this finger, Mr. Dauenhauer did not acquiesce in the charge of infringement, but only stopped manufacturing the finger because (as he advised the appellant's counsel herein) (R.261) to fight the infringement suit was too costly. Here we have evidence of the most cogent nature that it would be grossly inequitable for the appellee to be left to bear the burden of her heavy counsel fees in all three of these unjustified litigation cases.

cf: *Frank Adam Electric Co. v. Colts etc.,* 148 F.2d 497.

If there had been the least bit of *truth* in what Mr. Thys testified to, the question arises why did he not join the Dauenhauer Manufacturing Company in the suit?

If there had been the least bit of *good faith* on the part of the appellant in instigating this suit the appellant would not have continued its prosecution in the manner in which

it did after the appellant's attention was particularly directed to the license agreement in appellee's answer (R. 8:(14)); would not have continued to prosecute the case after the appellant was compelled at the trial to disavow all old elements in the alleged "mechanical devices" relative to the anchoring means (Op. Br. 9; R. 211-212; 101:10-13) and would not have prosecuted the case further after the appellant was unable to establish any alleged infringement on the part of the appellee after May 19, 1950, or after the date of due notice by filing the action, June 6, 1952 (R. 131), or to continue after the time the rejected Claim 27 was directed to Mr. Thys' attention (R. 74).

Under the circumstances of this case, therefore, including this frivolous appeal on the part of the appellant it would be manifestly unjust and grossly inequitable that the defendant-appellee should be left to bear the heavy burden of her own counsel fees; if any litigant ever was entitled to the benefit of the provisions of Section 285, Title 35 of the United States Code this appellee is.

VII

It would appear that it must have been through some oversight that the trial court erred in not awarding the defendant-appellee reasonable attorneys' fees as prayed for in her answer. It is believed that it would be utterly impossible to find a factual situation of more grossly inequitable and unconscionable conduct on the part of a litigant than is established herein on the part of the appellant. Consequently, the appellee herein can only rationalize the failure of the Court to make such an award as one of oversight. This is especially true, when it is to be noted that the Opinion of the District Court makes no mention of the reason for its failure to have made such an award as prayed for by the appellee.

And, it is submitted, that this Court should take into consideration the inability of the appellant in this case or the appellants (Thys Company and Horst Company) in the co-pending appeal No. 13,885, to state any coherent specification of error in either of these appeals. In fact, reviewing the records as a whole, there seems to be considerable indication that the only purpose of these appeals was in reality to permit the appellants to continue to collect royalty payments during the pendency of these appeals, namely, the years 1953, 1954 and 1955. It appears to the appellee's counsel such royalty payments will amount to approximately $145,665.00 for this three-year period.

This figure is arrived at by taking the baleage of the appellant's licensees shown in Planitiff's Exhibit 18 for Identification, in the co-pending appeal, (No. 13,885; R.448-449), together with the Plaintiff's Exhibit 15 in the same appeal (No. 13,885; R. 413-417) establishing a rate of $5 per bale (as it is believed that the appellant was not any more onerous upon the appellee herein in charging her $5.00 per bale than the appellant was to the other growers). Therefore, it must be assumed, there being no evidence to the contrary, that each of the other growers were also obligated to pay $5.00 a bale per year. This means approximately $48,550.00 for each of the three years involved, 1953, 1954 and 1955. Of course, this only covers the Sacramento Valley growers and does not include any growers who might be affected by the litigation herein who reside in Oregon or Washington; there being a considerable number of growers in each of these two states.

It should also be noted from the referred to chart (Pls. Exh. 18, for Ind., Appeal No. 13,885; R. 448-449) that the individual grower is not taxed a sufficient amount in royalty payments to make it financially sound to incur the heavy

expense of invalidating the patents at issue in these two appeals. Further, it must be taken into consideration that the license agreement of the appellant is of the omnibus type, as shown in the agreement between the appellee herein and the appellants in the co-pending appeal No. 13,885 (Pls. Exh. 15, Appeal No. 13,885; R. 413, 417) and it is conceivable that one of the patents included might be valid, as well as useful, which the appellant would, no doubt, deprive the grower the use of if such grower should challenge the validity of any of the other patents included in the license. However, the license tax of $5 per bale is based upon all of the patents being valid. (Cf: Br. of Appellee, Appeal No. 13,885, p. 67).

Further, this surmise of the real reason for these appeals is also borne out by the very dilatory manner in which the appellant herein prepared its record for printing on appeal; taking from July 1953, to January, 1954, and then, only after the appellee had forced the completion of the record by a motion to dismiss.

CONCLUSION

It is submitted that there was an abuse of discretion on the part of the District Court in failing to award reasonable attorneys' fees to the appellee as provided for in Section 285, Title 35, U.S.C., in view of the overwhelming record of many acts of inequitable, unconscionable, unfair and oppressive tactics indulged in by the appellant herein against the appellee, as well as the clear-cut evidence in the record of bad faith on the part of the appellant in instigating this infringement action and continuing to prosecute the same against the appellee; that such failure on the part of the District Court must be said to have resulted from an erroneous conception of law on the part of the trial judge.

Shingle Product Patents, Inc. v. Gleason, 9 Cir., 1954, 211 F.2d 437.

Further, it is submitted that on the authority of such cases as *Blanc v. Spartan Tool Co.,* 178 F.2d 104 and *E. V. Prentice Co. v. Associated Plywood Mills,* D.C. Ore, 1953, 113 F. Supp. 182, 188 that the appellee is entitled to an award of reasonable attorneys' fees of the actual amount expended in the defense of the action in the trial court or in no event less than $7,500.00.

Further, it is submitted that pursuant to such cases as *Blanc v. Spartan Tool Co., supra,* the appellee is entitled to have an award made by this Court of reasonable attorneys' fees in the actual amount expended for such services on this appeal and in no event less than $2,500.00;

Further, it is submitted that this Court should take into consideration the oppressive burden that has been placed upon the appellee by reason of the appellant's violation (in this appeal and Appeal No. 13,885, co-pending) of this Court's rules as well as Rule 75(d) of the Federal Rules of Civil Procedure, thereby necessitating additional expense for legal fees by requiring appellee's counsel constantly to check and recheck the record from every conceivable angle in order to ascertain, if possible, what the appellant's point on appeal could possibly be, as well as to see whether the meagre record is sufficient for appellee's purposes. This last burden is required as the courts have held that the appellee may not recover costs for printing of needless portions of the record.

Further, it is submitted, that it is necessary that appellee's counsel undertake to discharge this referred to burden, for while this Court has held it is not required to consider points not properly presented, it may at its discretion do so.

Consequently, the appellee if she wishes to protect her judgment below, must endeavor to uncover any conceivable merit this Court may on its own motion determine exists in these two abortive briefs of the appellant. That the appellee's counsel was unable to find any such merit, does not mitigate against the necessity for undertaking the burden.

Therefore, it is submitted the appellee is entitled to an award of reasonable attorneys' fees in both this appeal and in the co-pending Appeal No. 13,885, in an amount of not less than $2,500.00 for each appeal.

Dated: September 10, 1954.

Respectfully submitted,

ARLINGTON C. WHITE,
MARGARET E. WHITE
WHITE & WHITE
Patent Counsel.

C. K. CURTRIGHT
Attorneys for Appellee.

(APPENDIX FOLLOWS)

APPENDIX I

TOWNSEND, TOWNSEND & HOPPE
901-905 Crocker Building
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San Francisco 4, California
Attorneys for Plaintiff

In the United States District Court
Northern District of California
Northern Division

Thys Company, a corporation Plaintiff, vs. Sophie Oeste, an individual, Defendant.	Civil Action No. 6669

PLAINTIFF'S AMENDMENTS AND ADDITIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY DEFENDANT

Now comes the plaintiff and, pursuant to Rule 5(e) of the Rules of Practice of this Court, submits the following suggestions and criticisms with respect to the Findings of Fact and Conclusions of Law proposed by defendant.

Proposed Finding 5.

Finding 5 proposed by plaintiff (sic) should be eliminated. It does not appear to be material to the Opinion of the Court,

the Court being of the opinion that the testimony of Mr. Trabucco on this point was an incidental matter (Opinion, Page 8).

Proposed Finding 8.

Lines 3 and 4 of this proposed finding (Page 5, Lines 1 and 2) should be changed to read: "had two legs of a picking finger twisted together to give it rigidity." Defendant is in error in contending that plaintiff conceded that the Trowbridge Patent had a disclosure of two adjacent legs of adjacent picking fingers twisted around each other to give rigidity to the fingers. In this connection the plaintiff calls the attention of the Court to the reporter's transcript of arguments, Pages 7, and 59-60, and to the Opinion of the Court, Page 7.

Proposed Findings 13 and 14.

Proposed Findings 13 and 14 should be eliminated. Defendant suggests these two findings to support a claim for attorneys' fees. There is no evidence in this record warranting the charge that the plaintiff acted without proper cause or reasonable provocation and in the absence of good faith. There is no suggestion in the Opinion of the Court that the Court was of the view now tendered by defendant.

Proposed Conclusion of Law 3.

In proposed Conclusion of Law 3, Page 7, Line 23, the language "together with reasonable attorneys' fees" should be stricken. As pointed out in connection with the discussion of proposed Findings of Fact 13 and 14, this matter is not covered in the Court's Opinion and there is no evidence from which it may be inferred that this is an exceptional case within the provisions of U.S.C. Title 35, Section 285.

Conclusion.

The plaintiff, in making the foregoing suggestions and criticisms, is guided solely by the Opinion of the Court and makes the suggestions as a matter of form so that any Findings and Conclusions which may be entered will be within the bounds of the Court's Opinion and in conformity therewith. By making the foregoing suggestions, plaintiff does not admit that any of the proposed findings are supported by the record or that they are not clearly erroneous.

Respectfully submitted,

/s/ Stephen S. Townsend
Stephen S. Townsend

/s/ Charles E. Townsend, Jr.
Charles E. Townsend, Jr.

/s/ Carl Hoppe
Carl Hoppe
Attorneys for Plaintiff

Receipt of three copies of the foregoing is hereby acknowledged this 24th day of March, 1953.

.....

One of the Attorneys for Defendant

No. 13945

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Application of
DONALD E. CHANDLER
For Writ of Habeas Corpus,

Appellant,

vs.

FRED T. WILKINSON, Warden, Federal Penitentiary, McNeil Island, Washington,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

HONORABLE OLIVER J. CARTER, *Judge*

BRIEF OF APPELLEE

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HONORABLE OLIVER J. CARTER, *Judge*

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Appellant,

vs.

FRED T. WILKINSON, Warden, Federal Penitentiary, McNeil Island, Washington,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE OLIVER J. CARTER, *Judge*

BRIEF OF APPELLEE

STATEMENT OF PLEADINGS AND FACTS

The outline of the Statement of Facts presented by appellant is substantially correct, and such difference as appears from the facts stated in the Order of Dismissal, entered June 5, 1953, is inconsequential and not material to the question involved.

Appellee, therefore, does not desire to controvert

any implication created by emphasis or otherwise because he believes the instruments referred to, being a part of the record, speak for themselves, and because the facts upon which appellant specifies error seem sufficiently clear.

QUESTION PRESENTED

Did the delivery from a State Penitentiary of a prisoner on a writ of habeas corpus ad prosequendum to the federal authorities for trial resulting in his conviction, following which he was duly returned to the state institution for completion of his state sentence, render the federal jurisdiction such over him that he would be entitled, after service of his state sentence, to maintain that his federal sentence had commenced to run at the time of imposition?

ARGUMENT AND AUTHORITIES

Appellant in his opening brief takes the position that he is not concerned with the spirit of comity that exists between the several jurisdictions, and that in the absence of the specification that his federal sentence was to be served consecutively to his state sentence, that his federal sentence began on the date of imposition. (Appellant's Brief — Pages 7-8.)

On page 7 of his brief, appellant reaches the conclusion that in order to avoid his federal sentence

commencing on date of imposition, it should have recited it was to commence at the expiration of any other term appellant then was serving.

Appellee submits that such reasoning might have some application provided the State had undertaken by proper contract with the federal authorities to perform duties assigned to federal institutions and authorities, or if the federal authorities had acquired exclusive jurisdiction over appellant. However, appellee is unaware of any delegation of authority with respect to such duties, and certainly federal jurisdiction was then limited.

In *Lunsford v. Hudspeth*, 126 F. (2d) 653, at page 655, it is stated:

> "Embedded in the question presented is an interplay between state and federal sovereignties in the exercise of the power of each to enforce and vindicate its laws. Out of the exercise of this power has evolved the now axiomatic rule of law that a sovereignty, or its courts, having possession of a person or property cannot be deprived of the right to deal with such person or property until its jurisdiction and remedy is exhausted *and no other sovereignty, or its courts, has the right or power to interfere with such custody or possession.*" (Italics ours.)

After discussing the facts in the light of cases cited therein, the Court, in the Lunsford case, said:

> "We hold in these circumstances, that the custody and control of the United States Marshal of the United States court, over the petitioner was temporary and that the Marshal acted in accordance with the established rules of comity and in obedience to the writ of habeas corpus ad prosequendum, under which he acquired jurisdiction of the petitioner when he returned him to the Warden of the state penitentiary."

The court, in the Lunsford case, found other compelling reasons for its decision in the terms of the statute, presently Title 18, U. S. C., Section 3568, which provides:

> "The sentence of imprisonment of any person convicted of an offense in a Court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail *for service of* said sentence. (Italics ours.)
>
> "If any such person shall be committed to a jail or other place of detention to wait transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or place of detention.
>
> "No sentence shall prescribe any other method of computing the term."

Aside from his own argument appellant has cited no authority that would lend aid to his theory that his federal sentence began on the date of imposition. There is no showing whatever by the appellant that he was being held prior to February 10, 1953, by the

United States Marshal awaiting transportation to a federal institution of imprisonment. Certainly, the appellant has cited no legal authority to support his contention that his sentence began to run at any time prior to February 10, 1953, when, as he sets forth in his brief at page 3,

> " * * * at which time he was discharged from Folsom Prison and immediately upon discharge U. S. Marshals took appellant into custody and said U. S. Marshals thereafter transported and delivered appellant to the United States Penitentiary, McNeil Island, Washington, * * *."

In further support of appellee's position and upholding the judgment of the District Court, are the following cases:

Gunton v. Squier, C.A. Wash., 1950, 185 F. (2d) 470;

Hayden v. Warden, C.C.A. Wash., 1941, 124 F. (2d) 514;

Rohr v. Hudspeth, C.C.A. Kan. 1939, 105 F. (2d) 747;

Vanover v. Cox, C.C.A., Mo. 1943, 136 F. (2d) 442.

No time was fixed for the commencement of the sentences in any of the above cases, except *Hayden v. Warden*, supra, and in that case the contention was made that the time of commencement was thereby made indefinite, and the Court at page 515, recognized the statute itself as controlling notwithstanding the

designation it was to be served consecutively to the state sentence.

Harrell v. Shuttleworth, 101 F. Supp. 408 is far more illustrative of the principle that as to time of commencement of sentence the statute is controlling nothwithstanding the federal sentence may provide that such sentence is "to begin at the expiration of sentence defendant is now serving in the Florida State Prison."

See also

Ponzi v. Fessenden, 258 U.S. 254;
Howell v. Hiatt, 55 F. Supp. 142;
Stamphill v. U. S., 135 F. (2d) 177.

In *Zerbst v. McPike*, 97 F. (2d) 253, at page 254, the Court expressly recognized "no time being fixed for the commencement of the sentence," the federal sentence could begin to run only from the date on which appellant was received at the federal penitentiary. (Headnote 5.)

CONCLUSION

For the reasons hereinabove stated, it must be contended that the decision below should be affirmed.

Respectfully submitted,

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